89-761

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Petitioners,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where a plaintiff has established a federal agency's continuing violation of the National Environmental Policy Act of 1969, may a district court, in the exercise of its discretion, enjoin the agency's violation of the law without also requiring the plaintiff to establish that harm has occurred or will occur to the environment?

2. Is the "irreparable harm" which must be shown prior to the issuance of injunctive relief for violations of the National Environmental Policy Act of 1969 limited exclusively to injury to the environment?

3. Does a continuing agency violation of NEPA in itself establish "irreparable harm" upon which a district court may, in the exercise of its discretion, base its determination to grant or withhold injunctive relief?

4. Was the decision below incorrect in rejecting the standards for issuing injunctive relief for violations of the National Environmental Policy Act of 1969 as applied by the First, Sixth, Eighth, Tenth and District of Columbia Circuits?

5. Did the decision below misconstrue and misapply this Court's rulings in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987)?

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IN THE

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OCTOBER TERM, 1989

No. _____

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JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Town of Huntington, County of Suffolk, County of Nassau, Town of North Hempstead, Town of Oyster Bay and Robert J. Mrazek respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, dated August 14, 1989. That judgment and opinion vacated an injunction, issued by the United States District Court for the Eastern District of New York, based on violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4375 ("NEPA"),

and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (the "Ocean Dumping Act"), by the United States Army Corps of Engineers (the "Corps"). Petitioners seek review of that portion of the Second Circuit's decision declaring that, as a matter of law, a district court may not enjoin violations of NEPA unless the plaintiff first prove that the contemplated action will cause irreparable injury to the environment.

OPINIONS BELOW

The opinion issued by the district court on March 22, 1988, finding that petitioners had succeeded on the merits is unreported and reprinted in the Appendix at A20.[1] The opinion of the Second Circuit affirming that finding is reported at 859 F.2d 1134 (2d Cir. 1988) ("*Huntington I*") and reprinted in the Appendix at A37.

The district court opinion of January 3, 1989, issuing the injunction is unreported and reprinted in the Appendix at A55. The opinion of the court of appeals reversing the district court is reported at 884 F.2d 648 (2d Cir. 1989) ("*Huntington II*") and reprinted in the Appendix at A1. The district court's opinion on remand, dated October 26, 1989, is unreported and reprinted in the Appendix at A64.

Citations to all opinions are to the relevant pages in the Appendix.

JURISDICTION

The relevant decision of the Second Circuit was entered on August 14, 1989. A1. On September 8, 1989, the Second Circuit denied petitioners' motion to stay the issuance of its mandate

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1 References in the form "A" refer to pages of the Appendix to this Petition.

pending certiorari review. A17-19.[2] On October 26, 1989, having conducted further proceedings in accordance with the mandate of the Second Circuit, the district court set aside the agency action but denied petitioners' request for injunctive relief. A64-69.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant sections of NEPA are 42 U.S.C. §§ 4321, 4331 and 4332, the relevant portions of which are reprinted in the Appendix at A71-73. The relevant section of the Administrative Procedure Act, 5 U.S.C. § 706, is reprinted in the Appendix at A70.

STATEMENT OF THE CASE

In 1982, petitioners commenced this suit for declaratory and injunctive relief against the Corps for its unlawful designation of a dredged spoils disposal site in western Long Island Sound known as WLIS III.[3] On March 22, 1988, the district court granted Huntington's motion for summary judgment. The district court held that the Corps violated the Ocean Dumping Act because it designated the WLIS III site without considering the nature, quantity and cumulative effects of the dredged spoils to be dumped there. A24-28; *see* 33 U.S.C. §§ 1412, 1413, 1416(f); 40 C.F.R. § 228.6(a). The district court further held that the Corps' environmental impact statement (the "EIS") submitted in conjunction with the proposed site did not comply with NEPA because it failed to discuss the nature, quantities and

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2 The Second Circuit's issuance of its mandate did not extinguish the right to petition for certiorari review of the judgment. *Aetna Casualty & Sur. Co. v. Flowers*, 330 U.S. 464, 467 (1947); *Carr v. Zaja*, 283 U.S. 52, 53 (1931); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036, at 19 & n.26 (1988) (citing cases).

3 The history of the disputed designation of the WLIS III disposal site is summarized in *Huntington I*. *See* A39-43.

cumulative effects of dredged spoils to be dumped at the proposed site. A28-31; *see* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 228.6(b). The district court declared the EIS void and enjoined the Corps from dumping and issuing permits for dumping dredged spoils at the WLIS III site unless and until the Corps should issue an EIS complying with NEPA. A35.

On October 19, 1988, the Second Circuit affirmed the district court's ruling that the Corps' designation of the WLIS III site violated both NEPA and the Ocean Dumping Act. A44-52. Thus, the agency action was properly set aside as "not in accordance with law." A54; *see* 5 U.S.C. § 706(2)(A). However, the Second Circuit vacated the injunction and remanded the case to the district court, because the district court had not explicitly addressed the appropriateness of injunctive relief on the facts of the case. A53.

On remand, the district court issued a second opinion and order enjoining the Corps from dumping dredged spoils, or granting permits to dump dredged spoils, at WLIS III pending compliance with NEPA and the Ocean Dumping Act. A55-63. In response to the mandate of the Second Circuit in *Huntington I*, the district court specifically engaged in a traditional balancing of the equities. A58-59, 63. In short, the district court found that the only adverse effect of the issuance of the injunction would be "inconvenience and additional cost to owners of docks and piers." A59. On balance, the district court concluded that the public interest in the Corps' compliance with NEPA and the Ocean Dumping Act prior to further dumping at the unlawfully designated site outweighed the reasons for denying the injunction. A58-59.

On August 14, 1989, a panel of the Second Circuit vacated the district court's injunction. A1. Although plaintiffs had established that the challenged agency action violated federal law, the Second Circuit, purportedly relying on *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), held that the "irreparable harm" prerequisite to the granting of injunctive relief "may not be postulated *eo ipso* on the basis of procedural

violations of NEPA." A9-12, 14. Specifically, the panel required petitioners to prove "substantial danger to the environment, in addition to a violation of procedural requirements . . . ." A13. The Second Circuit remanded the case for an evidentiary hearing in the district court regarding, *inter alia*, the parties' disputed contentions regarding injury to the environment.[4]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because this case provides the ideal vehicle for the establishment of clear and unambiguous guidelines applicable to the exercise of a federal district court's discretion to issue injunctive relief in response to ongoing violations of NEPA. The question of the scope of a federal court's discretion to issue injunctive relief in NEPA litigation was expressly left open by this Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). *See infra* Part C. With the decision of the Second Circuit, there is clearly a conflict among the circuits regarding the power of a district court to issue an injunction without first making a determination that environmental injury will result from the NEPA violation. *See infra* Part B. In spite of this Court's recent statements of the overriding procedural purposes of NEPA in *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989), and *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989), it is now the law in the Second Circuit and a minority of other lower federal courts that a district court is without power to enjoin ongoing violations of the statute unless a plaintiff has proven environmental harm as well. This confusion is due in part to a misconception

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4 On September 8, 1989, the Second Circuit denied petitioners' request for a stay of further proceedings pending this Court's review. A17-19. Without the stay, the mandate issued, and district court calendared the case for the mandated evidentiary hearing. On October 26, 1989, the district court issued a judgment declaring the EIS regarding the designation of the WLIS III site "void and of no effect." A68-69. The district court, however, found that petitioners had not sustained their burden of proving environmental harm and withheld injunctive relief. A65-66.

of the significance of this Court's rulings in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). *See infra* Part D. This Court should grant certiorari to settle this conflict among the circuits, define the permissible objectives of NEPA litigation and rectify the misapplication of its rulings in *Weinberger* and *Amoco Production Co.*

A. The Second Circuit's Decision is in Conflict with NEPA's Objectives as Pronounced by this Court

NEPA is a policymaking statute, and its mandate is "essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *see* 42 U.S.C. § 4331. The procedural objectives of the statute were explained by this Court last Term as follows:

> NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing government and public attention on the environmental effects of the proposed agency action. 42 U.S.C. § 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information only to regret its decision after it is too late to correct. . . . Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.

Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1857-58 (1989). In a companion case, this Court further explained NEPA's procedural mandate to federal agencies:

> Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . Other statutes may impose substantive environmental obligations on fed-

> eral agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.

Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989) (footnote omitted). Nothing in NEPA prevents an agency from taking an action which causes environmental injury. *Id.* Thus, nothing in NEPA confers upon a district court the authority to issue an injunction solely to prevent the agency from causing such injury. Only the need to protect Congress' procedural mandate confers upon a district court the power to issue injunctive relief for NEPA violations. The rule set down by the Second Circuit, which allows a federal agency to disregard NEPA procedures absent an additional showing of some environmental harm inflicted by the agency, flies in the face of the statute and vitiates the NEPA process.

B. There is a Conflict Among the Circuits on a Material Issue of Law. Contrary to the Second Circuit in this Case, the Majority of Circuits Has Construed "Irreparable Harm" in NEPA Cases Consistently with the Statute

Given the well-settled objectives of NEPA, it is the view of most federal circuit courts of appeals that the "harm" contemplated by NEPA is harm to the process mandated by Congress. *Sierra Club v. Marsh*, 872 F.2d 497, 499 (1st Cir. 1989); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985); *Massachusetts v. Watt*, 716 F.2d 946, 951-52 (1st Cir. 1983); *Scherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1005-06 (5th Cir. 1981); *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512-13 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975).

Thus, when an agency proceeds with a proposed federal action in violation of NEPA's mandated procedures, the harm sought to be remedied by the statute has already occurred. *Foundation on Economic Trends v. Heckler*, 756 F.2d at 157; *Massachusetts v. Watt*, 716 F.2d at 952; *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d at 512-13;

Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1183-84 (6th Cir. 1972); *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1119 (N.D. Tex. 1985).

This definition of "harm" in the context of NEPA litigation is squarely based on the very purpose of the statute. This was explained by the First Circuit in the following passage:

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.

Massachusetts v. Watt, 716 F.2d at 952. If there was any need to further clarify the reasoning supporting the majority position, that need was attended by a subsequent opinion of the District of Columbia Circuit:

> The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur. . . . If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate and irreparable injury. Although the *balancing* of this harm against other factors is necessarily par icularized, . . . the injury itself is clear.

Foundation on Economic Trends v. Heckler, 756 F.2d at 147 (emphases in original).

The Second Circuit, without any discussion of NEPA's requirements or its objectives, reached a result in direct conflict

with the cases cited above.[5] Under the rule postulated by the Second Circuit, a government agency can simply disregard NEPA's requirements and yet a district court is powerless to enjoin that action unless a plaintiff can show irreparable environmental injury.

A similar rule appears to be in effect in the Fourth and Fifth Circuits. In *South Carolina Dep't of Wildlife & Marine Resources v. Marsh*, 866 F.2d 97, 100 (4th Cir. 1989), the Fourth Circuit narrowed the scope of a district court's injunction to that "reasonably required to protect the environment." Similarly, in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 574 (5th Cir. 1974), the Fifth Circuit reversed a district court's injunction because it was made without a finding of irreparable environmental harm.[6]

This Court should grant certiorari to settle this conflict among the circuits.

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5 In *Huntington II*, the Second Circuit expressly recognized its departure from the analysis adopted by the First Circuit in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989). A12 n.1. The Second Circuit, however, sought to minimize the practical effect of this conflict by stating that the application of the First Circuit's NEPA analysis would not change the result in this case because this case also involves a violation of the Ocean Dumping Act. This petitioner fails to see how, having established a violation of the Ocean Dumping Act, it is now deprived of its rights under NEPA.

6 There appears to be some confusion as to the state of the law in both the Fourth and the Fifth Circuits. In *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1333-34 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972), the Fourth Circuit did not require a showing of environmental harm as a prerequisite to injunctive relief, stating that a district court may enjoin an agency's continuing violation of NEPA to avoid rendering the mandated NEPA process a "meaningless formality." *Id.* at 1333. This case was neither overruled by nor addressed in *South Carolina Dep't of Wildlife*.

In a case subsequent to *Canal Authority*, the Fifth Circuit in *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1005-06 (5th Cir. 1981), set down the specific remedial aims to be achieved by enjoining a NEPA violation and did not include the prevention of environmental injury. Again, however, the circuit court did not specifically overrule or even address its prior holding in *Canal Authority*.

C. This Court Should Address the Issue of Injunctive Relief for NEPA Violations Left Open in *Kleppe v. Sierra Club*

In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), this Court reviewed the District of Columbia Circuit's grant of an injunction based on an agency's failure to file a broad regional environmental impact statement before proceeding with a local action for which an adequate individual environmental impact statement had already been issued. Because this Court held there was no NEPA violation in that case, it expressly withheld passing judgment on the District of Columbia Circuit's statement that "the 'harm' justifying an injunction 'matured' whenever an impact statement is due and not filed." 427 U.S. at 407. This Court, for the purposes of that case, accepted the circuit court's own statement of the law and resolved the issue by finding that no regional impact statement was ever "due." *Id.*

By contrast in this case, it is undisputed that the WLIS III impact statement is deficient and thus void and of no effect. *See* A3-4, 35, 63, 68-69. Here, the law as stated by the District of Columbia Circuit and the majority of other circuits compels a finding of irreparable harm justifying an injunction. The decision of the Second Circuit cannot be allowed to stand without holding the District of Columbia Circuit, and the majority of other circuits, wrong and radically altering the conduct of NEPA litigation. This case provides this Court with an opportunity to address this question of national importance.

D. The Second Circuit Misconstrued and Misapplied *Weinberger v. Romero-Barcelo* and *Amoco Production Co. v. Village of Gambell*

Despite holdings to the contrary in other circuits, the Second Circuit now holds that the "teaching" of *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), is that a district court may not issue injunctive relief in NEPA litigation until "substantial danger to the environment, in addition to a violation of procedural requirements, is established." A12, 13. The

Second Circuit is wrong. If applicable at all, those cases support the opposite proposition.

First, in both of those cases, the courts of appeals erroneously foreclosed the district court's traditionally broad discretion to grant or withhold injunctive relief upon the finding of a statutory violation. In both cases, this Court reversed the courts of appeals and held that the relevant statutes did not foreclose the district court's traditional equitable discretion. *Amoco Prod. Co.*, 480 U.S. at 541-46; *Weinberger*, 456 U.S. at 320. In this case, the Second Circuit similarly erred in limiting the discretion of a district court to enjoin statutory violations by conditioning the exercise of that discretion on a plaintiff's showing of environmental harm.[7] Thus a district court has no discretion to issue injunctive relief for a violation of NEPA unless, in addition, some environmental injury is established. This limitation on the discretion of the district court is contrary to the teaching of *Weinberger* and *Amoco Production Co.*

Second, in both cases, this Court held the exercise of the district court's discretion must be guided by the legislative purposes of the violated statute. The violated statute in *Weinberger* was the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, whose purpose is the "integrity of the Nation's waters, . . . not the permit process." *Weinberger*, 456 U.S. at 314. The Court held that the district court is not required to issue an injunction for every procedural violation of the statute if there are countervailing equitable considerations and if less drastic remedies would fulfill the statute's substantive purpose.

The statute implicated in *Amoco Production Co.* was the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*, whose substantive purpose is "to protect Alaskan subsistence resources from unnecessary destruction."

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7 The rule adopted in the First and District of Columbia Circuits, and advocated by petitioners herein, does not *require* a district court to grant injunctive relief for every NEPA violation. Such a rule would violate the principles underlying *Weinberger* and *Amoco Production Co.* Rather, this rule *permits* the district court the discretion to grant such relief after the NEPA violation has been established, if the court, after balancing the equities, determines that such relief is appropriate.

Amoco Prod. Co., 480 U.S. at 544. Thus, the court of appeals in that case was wrong, based on a procedural violation of that statute alone, to restrict the district court's exercise of its equitable powers in granting or withholding injunctive relief.

By contrast, in this case, as recently stated by this Court, the violated statute is essentially procedural and does not impose substantive environmental obligations. *See Robertson v. Methow Valley Citizens Council*, 109 S. Ct. at 1846. Thus, a violation of the mandated procedures is precisely the type of injury which should justify injunctive relief in the appropriate circumstances. *See supra* pp. 6-9. Certainly neither *Weinberger* nor *Amoco Production Co.* requires that a district court disregard NEPA violations and refuse to enjoin those violations until it is established precisely what environmental injury will result from the agency's uninformed action. *Sierra Club v. Marsh*, 872 F.2d 497; *Massachusetts v. Watt*, 716 F.2d at 951-53; *accord Sierra Club v. Hodel*, 848 F.2d at 1097; *see also Wisconsin v. Weinberger*, 745 F.2d 412, 432-33 (7th Cir. 1984) (Cudahy, J., concurring in part, dissenting in part). The Second Circuit was wrong to hold the contrary and condition the district court's exercise of its discretion not simply on the finding of the statutory violations and a balancing of the equities as in *Huntington I*, but also on a finding of environmental harm.

Weinberger and *Amoco Production Co.* are decisions of potential consequence to every case seeking to enforce procedural statutory obligations and should not be subject to conflicting interpretations. This alone is cause for this Court to issue a writ of certiorari.

CONCLUSION

Certiorari should be granted.

Dated: New York, New York
November 13, 1989

Respectfully submitted,

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APPENDIX 4

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1196—August Term, 1988

(Argued: June 23, 1989 Decided: August 14, 1989)

Docket No. 89-6039

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs-Appellees,

—against—

JOHN O. MARSH, JR., SECRETARY OF THE U.S. ARMY, LT. GENERAL JOSEPH K. BRATTAN, CHIEF OF THE CORPS OF ENGINEERS, COLONEL C.E. EDGAR III, DISTRICT ENGINEER, ARMY CORPS OF ENGINEERS, NEW ENGLAND DIVISION, AND DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants-Appellants.

Before:

MESKILL, PIERCE and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge*, enjoining defendants-appellants from dumping dredged materials, or issuing permits to dump dredged materials, at a site designated Western Long Island Sound III.

Vacated and remanded.

ROBIN L. GREENWALD, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel), *for Defendants-Appellants*.

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Eric Lukingbeal, Hartford, Connecticut (Dwight H. Merriam, Duncan Ross Mackay, Robinson & Cole, Hartford, Connecticut, of counsel), *for Amici Curiae The Connecticut Marine Trades*

Association and The New York Marine Trades Association.

MAHONEY, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge*, enjoining defendants-appellants, John O. Marsh, Jr., Secretary of the U.S. Army, Lt. General Joseph K. Bratton, Chief of the Corps of Engineers, Colonel C.E. Edgar, III, District Engineer, Army Corps of Engineers, New England Division, and the Department of Army Corps of Engineers of the United States of America (collectively the "Corps") from dumping dredged materials, or issuing permits to dump dredged materials, at a disposal site designated Western Long Island Sound III ("WLIS III") located in the Long Island Sound (the "Sound") off Huntington, New York. The Corps contends that the permanent injunction was erroneously entered by the district court in behalf of the plaintiffs-appellees, the Town of Huntington, County of Suffolk, County of Nassau, Town of North Hempstead, Town of Oyster Bay and Robert J. Mrazek (collectively "Huntington"), because the district court failed to balance the equities between the parties and conduct an evidentiary hearing as required by our prior decision in *Town of Huntington v. Marsh*, 859 F.2d 1134 (2d Cir. 1988) ("*Huntington I*"), familiarity with which is assumed.

In *Huntington I*, we affirmed the district court's grant of Huntington's motion for summary judgment and denial of the Corp's cross-motion for summary judgment, concluding that: (1) the Marine Protection, Research, and

Sanctuaries Act of 1972, 33 U.S.C.A. §§ 1401-1445 (1986 & West Supp. 1989) ("Ocean Dumping Act") applied to the initial designation of WLIS-III as a disposal site; and (2) the environmental impact statement ("EIS") issued by the Corps for its designation of WLIS III as a dumpsite violated (a) the Ocean Dumping Act because it failed to consider the Act's criteria for the designation of such sites, and (b) the National Environmental Protection Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4374 (1982 & Supp. V 1987), because it failed to consider the types, quantities and cumulative effects of the dredged material which would be deposited at WLIS III.

In *Huntington I*, however, we vacated a permanent injunction issued by the district court, identical to the permanent injunction before us on this appeal, because "neither the opinion [underlying the injunction] nor the order [imposing it] addressed the appropriateness of an injunction on the facts of this case," and remanded "for the purpose of making such a determination, to be guided by traditional equitable principles." 859 F.2d at 1143.

On remand, the district court again imposed an injunction identical in terms to the previously vacated injunction, without holding an evidentiary hearing, finding that "[t]he public has an interest in maintaining the physical, chemical and biological balance at the dump site that outweighs the private interest," described as "inconvenience and additional cost to owners of docks and piers." The Corps again appeals the determination of the district court.

We vacate and remand.

Background

The facts underlying this litigation are comprehensively stated in *Huntington I*, and that statement is incorporated by reference here. Briefly, in the fall of 1980, certain owners and operators of marinas in Mamaroneck Harbor, New York (the "Applicants"), located on the Sound, requested permits to conduct dredging operations on their properties and dispose of the dredged material at an ocean dumpsite, seeking to avail themselves of the economies arising from scheduled dredging of federal waterways in the area by the Corps and the resulting presence of dredging contractors. On March 23, 1981, the Applicants modified their application to allow disposal of their waste at "the closest available site" in the Sound, which was the Central Long Island Sound dumpsite ("CLIS") located off New Haven, Connecticut; that application was granted. On September 1, 1981, they again requested a modification to allow dumping further west in the Sound. Since there were no operative dumpsites west of CLIS in the Sound at the time, the Corps was required to designate a new dumpsite, which turned out to be WLIS III.

This designation was a "major federal action" requiring an EIS under NEPA. *See* 42 U.S.C. § 4332(2)(c) (1982). A final EIS was issued on February 12, 1982, and the Corps designated WLIS III on March 16, 1982. Huntington promptly initiated this litigation. Pursuant to permit applications granted by the Corps, dumping at WLIS III was conducted from the designation of the site until the entry of the initial injunction in this action on March 22, 1988, and thereafter until June 1, 1988, as authorized by a stay of that injunction entered by the district court upon application of the Corps. Under the original designation, dumping has never been allowed at WLIS III from June 1

to September 30 of any year, and no alteration of that arrangement is apparently contemplated by any party to this action.

No dumping has been conducted at WLIS III since June 1, 1988. The original injunction entered by the district court precluded the resumption of dumping after September 30, 1988, and the injunction entered after the remand in *Huntington I* (combined with a prior temporary restraining order) precluded it thereafter. The Corps contends that it has monitored the impact of the dumping that occurred at WLIS III from March, 1982 to June, 1988 (1) by reviewing applications for permits to dump at that site for, *inter alia*, their cumulative effect on the site; and (2) pursuant to an ongoing Disposal Area Monitoring System ("DAMOS") program established by the Corps in 1977, under which it monitors open water disposal sites for physical, chemical and biological effects of disposing of dredged materials. A DAMOS survey of WLIS III conducted in August and October, 1985 establishes, according to the Corps, that the dumping conducted at WLIS III has not had any adverse environmental impact.

As indicated earlier herein, upon remand in *Huntington I*, the district court imposed a permanent injunction identical to the prior injunction vacated in *Huntington I*, after oral argument but without any evidentiary hearing, stating:

> The Congress designated the WLIS III site as an ocean dumping site to give assurance that the physical chemical and biological balance in those waters would be maintained. The requirement of FEIS under ODA, NEPA and its regulations was for the purpose of giving the public adequate time and opportunity to investigate and argue the effects of the dumping of

dredged spoils. We do not accept the opinion of the Corps as a substitute for Congressional mandate. We believe that absent an injunction prohibiting the dumping, the Corps will engage in the practice of issuing permits for the illegal use of the site.

The resulting effect of the issuance of an injunction is the inconvenience and additional cost to owners of docks and piers. The public has an interest in maintaining the physical, chemical and biological balance at the dump site that outweighs the private interest.

* * *

In balancing the competing claims and the effect the granting or withholding of the injunctive relief would have on the parties, we find that the plaintiffs have established irreparable damage and the right to the

injunctive relief as set forth in the Permanent Injunction Judgment dated March 22, 1988.

(Footnote and citations omitted.)

This appeal followed. At the oral argument of the appeal, counsel for the Corps stated that the data compilation and report review for the new EIS under preparation by the Corps pursuant to court order would be completed by August 15, 1989, and the proposed EIS would be released for a forty-five day public comment period on October 16, 1989. Final issuance of an EIS would follow thereafter, the timing dependent upon the nature and complexity of the public comments and resulting action by the Corps. The outstanding injunction provides that "[t]he court retains jurisdiction over this matter and grants defendants the opportunity to comply with the pertinent statutes and regulations and seek modification of this judgment."

Counsel for Huntington contended at oral argument that the violation of NEPA resulting from issuance of a defective EIS establishes irreparable injury, to be balanced "on a particularized basis in each case against the competing equities." He conceded, however, that Huntington did "not contest" the Corps' assertion that it had conducted ongoing studies of WLIS III which "indicate a lack of environmental damage" from the dumping that has occurred at that site.

Discussion

The issues concerning the Corps' violation of the Ocean Dumping Act and NEPA in connection with its initial designation of WLIS III were both resolved in favor of Huntington in *Huntington I*. The only issue to be resolved on this appeal is whether the injunction issued upon remand was properly entered.

As we recognized in *Huntington I*, provision is made for injunctive relief in the Ocean Dumping Act, 33 U.S.C. § 1415(g)(1) (1982). 859 F.2d at 1143. We further recognized that injunctive relief has been used when appropriate for violations of NEPA. *Id.*, *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 94-95 (2d Cir. 1975). We also noted, however, that injunctive relief does not follow automatically upon a finding of statutory violations, including environmental violations. 859 F.2d at 1143. "On the contrary, '[a]n injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable.' " *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919))); *see also*

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542-45 (1987) (preliminary injunction).

The Supreme Court has repeatedly held that the basis for injunctive relief is irreparable injury and the inadequacy of legal remedies. *Amoco Prod. Co.*, 480 U.S. at 542; *Weinberger*, 456 U.S. at 312; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (essence of equity jurisdiction is power of chancellor to do equity and mould decree to necessities of particular case).

In applying these general equitable standards for the issuance of injunctions in the area of environmental statutes, the Supreme Court has explicitly rejected the notion that an injunction follows as a matter of course upon a finding of statutory violation. In *Weinberger*, for example, the United States Navy had conducted training activities in and around the Island of Vieques, a municipality of the Commonwealth of Puerto Rico, in the course of which it discharged ordnance into the adjacent waters. The Governor of Puerto Rico and others sued, alleging violation, *inter alia*, of (1) the Federal Water Pollution Control Act ("FWPCA") by failing to obtain a permit from the Environmental Protection Agency ("EPA") with respect to the discharge of ordnance; (2) an executive order relating to listing of sites in the National Register of Historic Places; and (3) NEPA by failing to file an EIS with respect to the training activities at Vieques. The district court agreed that these violations had occurred, and ordered that they be cured "with all deliberate speed," but refused to grant broader injunctive relief upon finding that the training activities were not causing any appreciable harm to the

Vieques ecology and were essential to the national defense. *Romero-Barcelo v. Brown*, 478 F. Supp. 646, 705-08 (D.P.R. 1979), *rev'd*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub. nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

On appeal, the First Circuit Court of Appeals determined that the injunction was properly limited with respect to the historic places issue, and that the Navy had filed the required EIS, mooting that issue. 643 F.2d at 862. On the FWCPA issue, however, the circuit court vacated and remanded with the direction that the Navy be enjoined from discharging ordnance into the coastal waters of Vieques until such time as a permit was obtained, *id.* at 862, stating: "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." *Id.* at 861.

In reversing, the Supreme Court registered its flat disagreement with the First Circuit's ruling. The Court said:

> The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA. As Congress explained, the objective of the FWCPA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).
>
> This purpose is to be achieved by compliance with the Act, including compliance with the permit requirements. Here, however, the discharge of ordnance had not polluted the waters, and, although the District Court declined to enjoin the discharges, it

> neither ignored the statutory violation nor undercut the purpose and function of the permit system. The court ordered the Navy to apply for a permit. It temporarily, not permanently, allowed the Navy to continue its activities without a permit.

456 U.S. at 314-15.

Similarly, in *Amoco Prod. Co.*, the Ninth Circuit Court of Appeals determined that the Secretary of the Interior had failed to comply with provisions of the Alaska National Interest Lands Conservation Act ("ANILCA") and directed the entry of a preliminary injunction enjoining certain oil and gas lease activity by the Secretary pending the outcome of the litigation. *People of Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), *rev'd sub. nom. Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987). In doing so, the circuit court held that " '[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action,' " and " '[o]nly in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation.' " 774 F.2d at 1423 (quoting *Save our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)).

The Supreme Court again reversed, specifically repudiating the quoted formulation as "contrary to traditional equitable principles and [having] no basis in ANILCA." 480 U.S. at 545. The Court further stated:

> [T]he environment can be fully protected without this presumption. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is *sufficiently likely*, therefore, the balance of harms will usually

> favor the issuance of an injunction to protect the environment. Here, however, injury to subsistence resources from exploration was *not at all probable*.

Id. (emphasis added).

The teaching of these cases seems clear, and is echoed by rulings in this circuit.[1] In *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745 (2d Cir. 1977), for example, we reviewed our rulings on the precise issue before this court, as follows:

> It is true . . . that appellant has pointed out cases which do appear to support appellant's position that any NEPA violation constitutes, per se, irreparable harm so as to require the issuance of preliminary injunctive relief, . . . but, as appellees correctly assert, the law in this circuit is clear on this issue and directly contrary to the position appellant would have

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1 The First Circuit, in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), expressed the view that because NEPA is a purely procedural statute, and because *Weinberger*, applying FWPCA, and *Amoco Prod. Co.*, applying ANILCA, dealt with statutes that embody substantive standards, *Weinberger* and *Amoco Prod. Co.* should not routinely govern decisions in NEPA cases. That is, irreparable harm is more likely to occur if the regulated activity goes forward concurrently with the NEPA process, because interests and expectations favoring the activity will harden as the NEPA process continues, and there is no statutory mandate other than to complete the process. In the case of statutes like FWPCA and ANILCA, on the other hand, there is a substantive standard against which the regulated activity will ultimately be subjected to meaningful measurement, even if it is allowed to continue *pendente lite*. *See Sierra Club*, 872 F.2d at 502-03.

Whatever the merits of this analysis, its application would not lead to a different result here. In addition to the process mandated by NEPA, *see* 42 U.S.C. § 4322(2)(c) (1982), this case is governed, as *Huntington I* held, by the substantive standards set by the Ocean Dumping Act, *see* 33 U.S.C. § 1413(a) (1982). *Weinberger* and *Amoco Prod. Co.* would accordingly control here under the *Sierra Club* analysis.

us adopt. In *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F.2d 927 (2d Cir. 1974), *vacated on other grounds and remanded*, 423 U.S. 809, 96 S.Ct 19, 46 L.Ed. 2d 29 (1975), we were confronted with the precise argument appellant advances here and we responded as follows:

> Although the procedural requirements of NEPA must be followed scrupulously and cost or delay will not alone justify noncompliance with the Act, where the equities require, it remains within the sound discretion of a district court to decline an injunction, even where deviations from prescribed NEPA procedures have occurred.

508 F.2d at 933-934 (footnotes omitted). This stance has been reaffirmed in *The East 63rd Street Association v. Coleman*, Docket No. 76-6083, at 3 (2d Cir., May 18, 1976) (order) [*see* 538 F.2d 309], in which we explained: "We also note that even if there were violations of the National Environmental Policy Act, which we by no means find, the district court has substantial discretion to determine whether an injunction should issue." *See Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 424-425 (2d Cir.), *cert. denied*, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed. 2d 90 (1972).

Id. at 753-54 (some citations omitted).

Broader injunctive relief is appropriate, of course, where substantial danger to the environment, in addition to a violation of procedural requirements, is established. In *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975), for example, we directed the entry

of a preliminary injunction prohibiting the Navy from continued dumping at a dumpsite off New London, Connecticut in the Sound, *id.* at 94-95. We found a threat of irreparable injury where substantial evidence was presented that contaminated material which the Navy proposed to deposit at that site "would eventually break up and disperse to the northwest where it would contaminate and destroy the first nurseries and marine resources on the coast," *id.* at 82. But a threat of irreparable injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of procedural violations of NEPA.

This especially concerns us on the record presented in this case. The Corps contends that it has monitored the dumping that occurred at WLIS III for more than six years, in connection with both the permits issued for dumping at that site and its DAMOS program to monitor such sites, and that no injury to the environment has occurred or is threatened as a result of the operation of WLIS III. At oral argument of this appeal, Huntington's counsel, upon specific inquiry, stated that Huntington did "not contest" this assertion.

We do not regard this colloquy as binding upon Huntington, and we note that Huntington introduced some evidence below of actual damage at the site. That evidence, however, was simply an assertion by a Huntington consultant in an affidavit that samples of materials from five Sound harbors, listed in the initial EIS as harbors that would utilize WLIS III for dredged material disposal, revealed sediments which, *if dumped at WLIS III*, would degrade the environment. The Corps maintains, on the other hand, that it does not allow dumping at WLIS III of sediments of the type specified by Huntington as potentially injurious to the environment.

The Corps also contends that interest other than "inconvenience and additional cost to owners of docks and piers," such as benefit to the State of Connecticut and its coastal zone management plan and increased safety of navigation for boats entering and exiting harbors in the Sound, weigh in favor of the continued operation of WLIS III pending the issuance of a valid EIS. It is not the function of this court to resolve these factual contentions. We review them only to indicate the nature of the considerations which the district court should address upon remand in determining whether any further injunction of dumping at WLIS III should issue in this action.

We do not regard the proceedings in the district court following the remand in *Huntington I* as consistent with these standards. The Corps sought an evidentiary hearing "to determine the appropriateness of injunctive relief here," but no such hearing was held. More decisively, the district court appears to have ruled that the establishment of a statutory violation, without more, warranted an injunction. The court determined that the public interest "in maintaining the physical, chemical and biological balance at the dumpsite" outweighed the competing private interest, defined as "inconvenience and additional cost to owners of docks and piers," resulting in a determination that "plaintiffs have established irreparable damage." No consideration was given, however, to the question whether plaintiff had met its burden to establish some actual or threatened injury to "the physical, chemical and biological balance at the dump site," as distinguished from the Corps' conceded failure to generate a proper EIS before its initial designation of WLIS III.

This is the inquiry to be pursued at an evidentiary hearing upon remand. Plaintiffs, of course, will bear the bur-

den of establishing irreparable injury, *see Corenco Corp. v. Schiavone & Sons, Inc.*, 362 F. Supp. 939, 944 (S.D.N.Y.), *aff'd*, 488 F.2d 207 (2d Cir. 1973); *United States v. Gilman*, 341 F. Supp. 891, 907 (S.D.N.Y. 1972), and the court should consider and balance all the equities and interests presented for its determination. *Weinberger*, 456 U.S. at 311-13 (collecting cases).

Finally, we note the representations made by the Corps at oral argument concerning the timetable for generating an EIS, and trust that this effort will be pursued expeditiously. We have no reason to doubt the Corps' *bona fides* in this regard, but simply note that this factor has a bearing on the overall equities which the district court must consider. *Cf. Weinberger*, 456 U.S. at 320 (should it become clear that compliance with environmental statute not forthcoming, court should reconsider balance of equities it has struck).

Conclusion

The judgment of permanent injunction is vacated and the case remanded for further proceedings consistent with this opinion. The mandate shall issue forthwith.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 89-6039

TOWN OF HUNTINGTON, *et al.*,

Plaintiffs-Appellees,

—against—

JOHN O. MARSH, *et al.*,

Defendants-Appellants.

NOTICE OF MOTION FOR STAY OF MANDATE PENDING CERTIORARI REVIEW

MOTION BY: (*Name and tel. no. of law firm and of attorney in charge of case*)
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Has consent of opposing counsel:

A. been sought?	☑ Yes	☐ No
B. been obtained?	☐ Yes	☑ No
Has service been effected?	☑ Yes	☐ No
Is oral argument desired?	☐ Yes	☐ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?	☐ Yes	☑ No
B. by firm date of argument notice?	☐ Yes	☑ No

C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? *(See F.R.A.P. Rule 8)*	☐ Yes N/A	☐ No
Would expedited appeal eliminate need for this motion?	☐ Yes	☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?	☐ Yes	☐ No

Judge or agency whose order is being appealed:
Honorable Jacob Mishler, Eastern District of New York.

Brief statement of the relief requested:

A stay of this Court's mandate, and further proceedings in the District Court in *Town of Huntington et al. v. Marsh, et al.*, 82 Civ. 0793 (JM), pending application for certiorari to the Supreme Court of the United States.

By: *(Signature of attorney)* Appearing for: *(Name of party)*

/s/ JOSEPH D. PIZZURRO — Town of Huntington

Signed name must be printed beneath

Joseph D. Pizzurro — August 16, 1989

Date

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant
Appellee or Respondent:
☑ Plaintiff ☐ Defendant

ORDER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed Sept. 8, 1989
Elaine B. Goldsmith, Clerk

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ THOMAS J. MESKILL (JDM)

/s/ LAWRENCE W. PIERCE (JDM)

9-8-89 /s/ J. DANIEL MAHONEY

Date Circuit Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 82-0793

March 22, 1988

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR, III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OF DECISION AND ORDER

APPEARANCES:

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MISHLER, *District Judge*

In March 1982, the Army Corps of Engineers ("Corps") designated an open water disposal site for dredged material in the Western Long Island Sound ("WLIS III"). On March 22, 1982, plaintiffs filed this action challenging the Corps' environmental impact statement for WLIS III pursuant to the National Environmental Policy Act of 1974 ("NEPA"), 42 U.S.C. § 4321 *et seq.* and the Marine Protection Research and Sanctuaries Act of 1972 ("Ocean Dumping Act"), 33 U.S.C. § 1401 *et seq.* Under NEPA the Corps is required to issue an environmental impact statement ("EIS") assessing the environmental consequences of designating WLIS III as a disposal site. Plaintiffs claim that the EIS prepared by the Corps is inadequate and does not provide a basis for designation of WLIS III in that the statement fails to consider the type, quantity and cumulative effect of the dredged material to be dumped at the proposed site.

Plaintiffs now move for summary judgment pursuant to Fed. R. Civ. P. 56, seeking:

1) a declaration that the designation of WLIS III as an open water dumping site is void and invalid;
2) a declaration that the EIS is invalid as it violates the requirements of NEPA; and
3) an injunction prohibiting the Corps from permitting dumping at WLIS III unless and until the Corps issues an environmental impact statement in conformity with NEPA and designates an open water site in conformity with the Ocean Dumping Act.

Defendants cross move for summary judgment claiming: (1) to the extent that the Ocean Dumping Act regulates the disposal of dredged materials in the Long Island Sound, the Act applies only to individual applications for permits to dispose of dredged material at open water sites; (2) NEPA does not mandate that criteria required under the Ocean Dumping Act for site designation be considered by the Corps when issuing an environmental impact statement; and (3) NEPA itself does not require, in an EIS for the designation of a disposal site, that the

Corps consider and discuss the type and quantities of materials to be disposed of at the site. Defendants also assert that the designation of WLIS III as a disposal site was in full compliance with NEPA and the applicable regulations.

DISCUSSION

Summary Judgment Standard of Review

We set out the general principles governing summary judgment motions. Summary judgment is appropriate where it appears from the pleadings, depositions, admissions, answers to interrogatories and affidavits—considered in the light most favorable to the opposing party—that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a mater of law. Fed. R. Civ. P. 56(c). The moving party has the heavy burden of establishing the absence of a genuine issue of fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 244 (2d Cir. 1984); *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2d Cir. 1982). That burden includes the presentation by the moving party of facts showing that his adversary's case is baseless or, in other words, such " 'evidence on which, taken by itself [the movant] would be entitled to a directed verdict.' " *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir. 1972) (quoting *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943)).

Summary judgment is an extreme remedy, not to be granted unless the moving party has established his right to judgment with such clarity as to leave no room for controversy. *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972). Summary judgment is not appropriate where an inquiry into the facts is deemed proper by the court to clarify the issues and application of law. During oral argument counsel for both sides agreed that there were no factual issues in dispute and that the court could decide the issues as a matter of law.

Application of the Ocean Dumping Act to the Designation of a Disposal Site at WLIS III

The Corps begins by arguing that the Ocean Dumping Act applies only to the issuance of permits for ocean disposal of wastes and not to the designation of open water dumping sites. (Defendants' Memorandum of Law at 15-18). The Corps is plainly wrong.

The Ocean Dumping Act, 33 U.S.C. §§ 1401 *et seq.*, and the regulations promulgated thereunder, set forth standards to be used in designating disposal sites and in evaluating applications for permits to dispose of material in ocean waters. 33 U.S.C. § 1412, 40 C.F.R. Part 228 (1987). The Act authorizes the Corps to issue permits and designate sites for dredged waste only, and the Environmental Protection Agency ("EPA") Administrator to issue permits and to designate sites for the disposal of all other wastes, *see* 33 U.S.C. §§ 1412(a)(c), 1413 (1987); 40 C.F.R. 228.4(e)(2) (1987); *National Wildlife Federation v. Costle*, 629 F.2d 118, 121 (D.C. Cir. 1980).

When the EPA Administrator is designating an ocean water dumping site the regulations set out criteria for site selection which specifically require the agency to consider the type and quantity of wastes proposed to be disposed of at the site. 40 C.F.R. § 228.6(a)(4) (1987). Similarly, the Corps cannot issue a permit for dumping of dredged materials in ocean waters until it has designated a site considering the same criteria and evaluation process that the Administrator must utilize when the agency designates an ocean dumping site for waste disposal. 40 C.F.R. § 228.4(2) (1987).[1] The Corps is required to have bio/assay/bioaccumulation data prepared for the known permit applications and an analysis of that data performed as to what effect the dredged material would have on the water quality,

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1 The Corps does not have to designate a site if it chooses to use a site previously designated by the Administrator.

aquatic life or wildlife at the proposed site.[2] Furthermore, the regulations specifically require the Corps to include the results of the disposal site evaluation in preparing an environmental impact statement where such a statement is required by EPA policy. 40 C.F.R. § 228.6(b) (1987). In sum, no permit can be issued for the dumping of dredged material unless a site has been properly designated and no site can be properly designated until the type and quantity of known dredged material to be dumped there have been considered, evaluated and explained in an environmental impact statement.

Originally, the Ocean Dumping Act applied only to ocean waters. 33 U.S.C. § 1411(a), 40 C.F.R. § 20.2(c) (1987). In 1980, Congress amended the Act to apply to Long Island Sound. 33 U.S.C. § 1416(f) states:

> (f) Dumping of dredged material in Long Island Sound from any Federal, etc., project. In addition to other provisions of law and not withstanding the specific exclusion relating to dredged material in the first sentence in section 102(a) of this Act [33 USCS § 1412(a)], the dumping of dredged material in Long Island Sound from any Federal project (or pursuant to Federal authorization) or from a dredging project by a non-Federal applicant exceeding 25,000 cubic years shall comply with the criteria established pursuant to the second sentence of section 102(a) of the Act [33 USCS § 1412(a)] relating to the effects of dumping. Subsection (d) of this section shall not apply to this sub-section.

(Oct. 23, 1972, P.L. 92-532, Title I, § 106, 86 Stat. 1058; Dec. 22, 1980, P.L. 96-572, § 4, 94 Stat. 3345).

Plaintiff contends that when Congress amended the Ocean Dumping Act to apply to the Long Island Sound, the Act, as

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2 According to the Affidavit of Dr. Terry C. Cosper, bio-assay tests indicate the extent to which certain species would be killed from exposure to the dredged materials. Bio-accumulation tests study the tissues of organisms surviving the bio-assay tests to determine if specific pollutants are retained by the species.

amended, applies to site designations as well as to permit applications. (Plaintiff's Memorandum of Law at 14). Defendants counter that the Act applies only to the Long Island Sound in connection with the issuance of a permit to dump dredged material and then only if the application is from a Federal project, or if the application is a non-Federal one for the disposal of greater than 25,000 cubic yards of dredged material. (Defendants' Memorandum of Law at 15).

When Congress amended the Ocean Dumping Act to apply to the Long Island Sound, it intended that "the same biological and testing procedures used to assess the suitability of dredged spoils for ocean disposal would be used to assess the suitability of dumping dredged spoils in Long Island Sound." H. Rep. No. 894, Part 2 at 8, 96th Cong., 2d Sess. (1980). The Committee believed that the "safeguards of the Ocean Dumping Act represent minimum safety standards acceptable to dredge soil disposal in . . . Long Island Sound." *Id.* at 7. The House Committee report stated that it was their intention to require that the same bio-accumulation tests and bio-assay tests which were already required before any permit could be issued for the ocean disposal of any dredge spoil be undertaken before allowing similar disposal in Long Island Sound. *Id.*

Under the Corps' interpretation of the amendment, these tests are not required unless permit applications to dump at WLIS III are made by Federal projects, non-Federal projects of over 25,000 cubic yards, or for highly toxic, Class III materials. (James Crawford Decl. ¶ 37). Accordingly, under the Corps' reasoning they would never be required to consider the type and quantity of dredged material when determining a site for disposal in the Long Island Sound, and, so long as the permit applicants are non-Federal, or less than 25,000 cubic yards, or do not contain Class III materials, the Corps does not have to consider the more exacting criteria set out in the Ocean Dumping Act before issuing a permit to dump at WLIS III.

We find this interpretation of the amendment to be illogical and not in keeping with the clear legislative intent of protecting the Long Island Sound from pollution by extending the safeguards of the Ocean Dumping Act to the dumping of dredged materials in the Sound.

At the time that the Corps was in the process of designating WLIS III as an open water disposal site there were at least 22 pending permit applications. Although none of these permit applications were from Federal projects of from non-Federal projects of over 25,000 cubic yards, the approximate volume of material to be dredged and disposed of was 86,000 cubic yards. (Crawford Decl. ¶ 8). According to the Affidavit of Herbert A. Smith, Jr., submitted by plaintiff, at least 84 permit applications have been submitted and over 667,240 cubic yards of dredged material have been disposed of at WLIS III.

If one follows the Corps' reasoning, there is no requirement that the Corps evaluate the cumulative impact that an extended period of dumping particular dredged materials would have on the aquatic life at WLIS III. There is no need to make a long range forecast as to what would be a reasonable rate of dumping or what the actual contaminant levels of dredged materials would be over an extended period of time. Rather, the Corps prefers to evaluate each permit application in isolation, considering only the immediate environmental impact that issuing a permit for one particular project would have on the site. The lack of long range planning for open water disposal was one of the primary problems Congress meant to solve when it enacted the Ocean Dumping Act. *See* U.S. Code Cong. & Admin. News, 92nd Cong., 2d Sess., 1972, p. 4234 *et seq*.

It simply does not make any sense that Congress meant that the Corps should be allowed to designate a disposal site for this magnitude of dredged material in the Long Island Sound without being required to perform the same tests on and analysis of the material to be disposed of as the Corps would be required to if it were designating a disposal site in the ocean waters. The risk of harm to the aquatic environment of the Long Island Sound that could be caused by such dumping is at least as substantial as the risk of harm to ocean waters.

We believe that when Congress amended the Ocean Dumping Act to apply to the Long Island Sound, the legislative intent was to make the entire Act, including the site designation regulations, applicable to the Long Island Sound. To allow over 667,240 cubic yards of dredged material to be dumped at an open water site without having properly designated the site

under the site selection criteria set forth in the regulations in 40 C.F.R. § 228 violates the spirit of the Ocean Dumping Act if not the exact letter of the law.[3]

Compliance with the National Environmental Policy Act of [1969]

Plaintiffs assert that NEPA requires the defendants, prior to designating a disposal site, to issue an environmental impact statement which analyzes and considers the nature and quantities of dredged materials to be disposed of at WLIS III and the cumulative effect of such dumping on the aquatic environment. (Plaintiffs' Memorandum of Law at 25). Plaintiffs' basis for this conclusion is two-fold. One, in order for the public to understand the statement and comment meaningfully, and in order to insure that the agency has fully considered the environmental factors, plaintiffs contend that a detailed statement regarding the environmental impact of the proposed action must consider and analyze the types and quantities of material to be disposed of at the proposed site. Second, plaintiffs state that the Ocean Dumping Act is incorporated by NEPA and therefore NEPA requires an agency to follow the more exacting criteria specified in the Ocean Dumping Act regulations when issuing an EIS in compliance with NEPA. (Plaintiffs' Memorandum of Law at 12).

Whether the Corps had to comply with the criteria analysis required under the Ocean Dumping Act for a site designation in the Long Island Sound is discussed in the preceding section. Therefore, we turn to the plaintiffs' second argument—that under NEPA itself the Corps' designation of WLIS III was insufficient absent a consideration of the nature, quantity, and cumulative effect of materials to be disposed of at the site.

Although our decision that the Ocean Dumping Act applies to site designation as well as permit applications for dumping of dredged materials in the Long Island Sound is dispositive of this

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3 Of course once the site has been properly designated the Corps would not be required to analyze the dredged material in accordance with the criteria established in the Ocean Dumping Act each time a permit application is made unless the permit application is made by a Federal project, a Federally authorized project or a non-Federal project of over 25,000 cubic years.

motion, we wish to address this second issue. We find that under NEPA itself, regardless of the application of the Ocean Dumping Act, the Corps' EIS statement was inadequate for its failure to address the type and quantity and cumulative effect of dredged material to be disposed of at WLIS III.

The purpose of an environmental impact statement is to enable others, who did not take part in the decision to designate the site, to comprehend and consider meaningfully the factors involved and to insure that the agency decision-maker has fully considered all the environmental factors involved in making the site selection. *See County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977). The requirements in 42 U.S.C. § [4332] set a high standard for the agencies to meet when issuing an environmental impact statement. *Chelsea Neighborhood Ass'n. v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975). Yet, NEPA does not require an agency to make a "crystal ball inquiry." Rather, under the "rule of reason," the EIS must set out only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all encompassing in scope that the task of preparing the report would become almost impossible. *National [Resources] Defense Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

In reviewing an agency determination "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences." *Klepp[e] v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 2730 n.21 (1976). "Given the role of the EIS and the narrow scope of permissible judicial review, the court may not rule an EIS inadequate if the agency has made an adequate compilation of relevant information, has analyzed it reasonably, has not ignored pertinent data, and has made disclosures to the public." (citations omitted) *County of Suffolk*, 562 F.2d at 1383.

"The district court cannot substitute its judgment for that of the agency." *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 468 (2d Cir. 1971), *cert. denied*, 407 U.S. 926, 92 S. Ct. 2453 (1972). Yet if the court finds that the agency did not make a reasonably adequate compilation of relevant information, or ignored conflicting views of

other agencies having pertinent expertise, the court may be properly skeptical as to whether the EIS's conclusions have a substantial basis in fact and may properly find that the EIS does not satisfy the requirements of NEPA. *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1030 (2d Cir. 1983).

Defendants contend that the final environmental statement was a detailed statement which considered and described the appropriate alternatives to the proposed site and that the agency's conclusions in the EIS have a substantial basis in fact. Further, the case law is clear that the statement does not have to engage in pure speculation or hypothesis but simply requires the EIS to consider all significant environmental consequences that can reasonably be expected to flow from the agency determination. *County of Suffolk*, 562 F.2d at 1377.

Plaintiffs have presented evidence in support of their claim that the EIS prepared by the Corps in designating WLIS III was unsatisfactory. Plaintiffs point to the abbreviated scoping period of five days[4] and the shortened review period and have submitted copies of comment letters from the United States Department of the Interior and the Office of Marine Pollution Assessment which were critical of the initial draft environmental statement. (Plaintiff's Exhibits B and C). The letters accused the Corps of doing a "rush" job. Both agencies pointed out the lack of site-specific data and the lack of physical and chemical data regarding the dredged material to be dumped at the proposed site. (Plaintiffs' Exhibit D).

It is only logical that the agency could not be required to consider in every instance the type and quantity of material to be disposed of when issuing an environmental impact statement. Obviously, in many cases, the agency will not have the neces-

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4 Plaintiffs contend that the scoping period was five days, based on the publication of a notice of intent published in the Federal Register on December 9, 1981 and the issuance of a draft environmental statement by the Corps on December 14, 1981. The Corps asserts that the scoping period began in August 1981 when the Corps first determined the need for an environmental impact statement. 40 C.F.R. § 501.7 (1987) requires that the scoping period be preceded by the publication of a notice of intent in the Federal Register.

sary data to make such an assessment. However, in the matter of WLIS III, the agency certainly knew where some of the dredged material would be coming from. Indeed, the Declaration of James Crawford makes it clear that the Corps was well aware of both Federal and private projects which had or would apply for permits to dispose of dredged material at the WLIS III site. (James Crawford Affidavit at ¶ 31). The Corps cannot claim that consideration of the type of dredged material to be disposed of would require the Corps to engage in pure speculation nor would the data have been overly difficult to have acquired. Reasonable forecasting and speculation are implicit in NEPA, and an agency cannot simply label it all a crystal ball inquiry. *Scientists' Institut[e] for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Furthermore, an EIS cannot ignore environmental consequences of the decision at hand on the ground that another report will be forthcoming later. *County of Suffolk*, 562 F.2d at 1377. In doing so, the Corps failed to permit intelligent and meaningful discussion regarding the environmental consequences of the disposal of dredged materials at WLIS III. Further, for the Corps to excuse a failure to include relevant, accessible information on the ground that it can consider such information later on a piecemeal basis (that is, as each applicant seeking a permit to dump is made) ignores the fact that the Corps has failed to adequately consider the long range cumulative effect that all these projects being dumped at WLIS III would have and the risk of harm to the marine community. *See National Resource[s] Defense Council v. Callaway*, 524 F.2d 79, 88-90 (2d Cir. 1975).

CONCLUSION

Having found that the Army Corps of Engineers did not comply with the Ocean Dumping Act and the applicable regulations promulgated thereunder, and having found that the environmental impact statement prepared for designating an open water disposal site at WLIS III was inadequate because it violates the requirements of NEPA, the court grants summary judgment in favor of the plaintiffs and denies defendants' cross-motion for summary judgment, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in the form approved by the court.

/s/ JACOB MISHLER
U.S.D.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 82-0793

Filed March 22, 1988

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR, III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants.

PERMANENT INJUNCTION JUDGMENT

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MISHLER, *District Judge*

The court having granted the plaintiffs' motion for summary judgment in a memorandum of decision and order dated March 22, 1988, now therefore, it is

ORDERED and ADJUDGED that defendants, their agents, servants, employees and anyone acting in concert with them are hereby enjoined from dumping any dredged materials removed from any harbor, waterway, or marina into the Long Island Sound site known and designated as WLIS III; and it is further

ORDERED and ADJUDGED that defendants, their agents, servants and employees, and anyone acting in concert with them are hereby enjoined and prohibited from issuing any permits or licenses or otherwise permitting any third parties from dumping dredged materials into the Long Island Sound site known and designated as WLIS III; and it is further

DECLARED that the Final Environmental Impact Statement made the basis for the decision to designate WLIS III as a site for the disposal of dredged material fails to comply with the National Environmental Policy Act of 1974 ("NEPA"), 42 U.S.C. § 4321 *et seq.* and is void and of no effect.

The court retains jurisdiction over this matter and grants defendants the opportunity to comply with the pertinent statutes and regulations and seek modification of this judgment.

Dated: Uniondale, New York
March 22, 1988

/s/ ROBERT C. HEINEMANN
Clerk

by: /s/ KEITH A. JONES
Keith A. Jones
Deputy Clerk

Approved as to form

/s/ JACOB MISHLER
U.S.D.J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1383, Docket 88-6095

Argued July 18, 1988 Decided Oct. 19, 1988

The TOWN OF HUNTINGTON, The County of Suffolk, The County of Nassau, The Town of North Hempstead, The Town of Oyster Bay, and Robert J. Mrazek,

Plaintiffs-Appellees.

—v.—

John O. MARSH, Jr., Secretary of the U.S. Army, Lt. Gen. Joseph K. Bratton, Chief of the Corps of Engineers, Colonel C.E. Edgar III, District Engineer, Army Corps of Engineers, New England Division, and Department of the Army Corps of Engineers of the United States of America,

Defendants-Appellants.

Robin L. Greenwald, Asst. U.S. Atty., Brooklyn, N.Y. (Andrew J. Maloney, U.S. Atty., E.D.N.Y., Robert L. Begleiter, Asst. U.S. Atty., of counsel), for defendants-appellants.

Joseph D. Pizzurro, New York City (John P. Campbell, Peter K. Vigeland, Peter Sullivan, Curtis, Mallet-Provost, Colt & Mosle, New York City, Arlene Lindsay, Daniel Martin, Town Attys., Huntington, N.Y., of counsel), for plaintiffs-appellees.

Before

ALTIMARI and MAHONEY, Circuit Judges,
and CEDARBAUM, District Judge.*

ALTIMARI, Circuit Judge:

The Long Island Sound (the "Sound") is host to a myriad of recreational and industrial uses, including swimming, boating and fishing. Recreational users, commercial fisheries and environmentalists share a sometimes uneasy co-existence with use of the Sound as a waste dumping ground. Marinas and harbors which line the Sound must be dredged periodically to provide safe berthing for pleasure craft, commercial fishing boats, and military ships. The spoil from these dredging operations has for decades been dumped into the Sound. This litigation arises out of the ongoing effort of citizens and the federal government to balance the use of the Sound as a waste dumpsite with the need to protect its increasingly fragile waters.

The United States Army Corps of Engineers, *et al.* (the "Corps") appeal from a judgment entered in the United States District Court for the Eastern District of New York (Jacob Mishler, *Judge*), denying their cross-motion for summary judgment, and granting plaintiffs' motions for summary judgment and a permanent injunction. The district court held that a 1980 amendment to the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401 *et seq.* (1982) ("Ocean Dumping Act" or "Act") applies to initial designation of an open water waste dumpsite in the Sound. The district court also held that an environmental impact statement ("EIS") submitted by the Corps was inadequate under both the Ocean Dumping Act and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1982 & Supp. III 1985) for its failure to discuss fully the types, quantities and cumulative effects of waste disposal at a new dumpsite. The district court

* The Honorable Miriam Goldman Cedarbaum, United States District Court for the Southern District of New York, sitting by designation.

enjoined the Corps from issuing dumping permits for dredged waste disposal in the Sound until the Corps issues a supplemental EIS which fully complies with NEPA and the Ocean Dumping Act.

On this appeal, the Corps contends that the Act does not apply to designation of a new dumpsite in the Sound because the Sound is inland not "ocean waters," and because permit applicants who were to utilize the new site were exempt from regulation under the Act. Specifically, the Corps argues that the Ocean Dumping Act as it relates to the Sound is triggered only when the Corps is presented with an application concerning a federal project or a nonfederal project of more than 25,000 cubic yards ("cys"). In all other situations, according to the Corps, the Sound is governed by the Clean Water Act and not by the Ocean Dumping Act. The Corps also contends that its EIS was adequate because the Corps was required to consider the types, quantities and cumulative effects of waste dumping at the new site only on a case-by-case basis and not at the time the site was chosen. Finally, the Corps asserts that the district court erred as a matter of law when it issued an injunction prohibiting the Corps from violating NEPA.

For the reasons that follow, the judgment of the district court granting plaintiffs' motion and denying defendants' cross-motion for summary judgment is affirmed. The permanent injunction is vacated, and the case is remanded for further proceedings.

BACKGROUND

In the fall of 1980, the Corps received applications from 23 parties (the "Applicants") requesting permits to conduct dredging operations on their properties in Mamaroneck, New York and to dispose of the dredged material in an ocean dumpsite. The Applicants were mainly owners and operators of marinas in Mamaroneck Harbor located on the Sound. The Corps had previously announced its intention to dredge federal waterways in the area, and the Applicants wished to take advantage of the presence of dredging contractors who were to perform the fed-

eral maintenance operation. They hoped to reduce the expense of their dredging operations since dredging equipment would already be in place in the harbor. Consequently, the Applicants initially requested to dispose of their waste material in an area called the "Mud Dump Site" where the Corps was also to dispose of its spoils. The Mud Dump Site, located in the Atlantic Ocean off the New Jersey coast, has been in use as a dredge waste dumpsite for more than seventy years and since 1960 has received over 9.5 million cys of waste. The Corps planned to add some 60,000-145,000 cys of waste from its Mamaroneck Harbor project; the Applicants collectively planned to add approximately 86,000 cys of waste, though no individual project was to exceed 25,000 cys.

Regulations promulgated under the Ocean Dumping Act require analysis of the types of sediments to be dredged before permits may be issued. To satisfy this requirement, the Applicants requested that the Corps accept the results of the Corps' own federal sampling of Mamaroneck Harbor. The Corps agreed to accept its data as representative of the Applicants' sediments and found that sediments from Mamaroneck Harbor would have no significant impact if disposed at the heavily used Mud Dump Site. On March 23, 1981, the Corps issued permits to the Applicants for the Mud Dump Site. However, because of fiscal and time constraints, the Applicants were not able to accomplish their dredging. As a result, on the same day that they were issued Mud Dump Site permits, the Applicants asked the Corps to modify the permits to allow disposal of their waste at "the closest available site" in the Sound.

In their modification request, the Applicants asked to be considered as a single entity in order to demonstrate the need for a dumpsite in the Sound, stating that they would "ultimately enter into a collective contract which would insure that the total yardage to be assembled and dumped would exceed 25,000 cubic yards." At the same time, they asked to be considered individually in order to avoid the environmental testing requirements of the Ocean Dumping Act. The Corps issued a public notice of the modification request and indicated that test results from the previous Mamaroneck Harbor study would be used to evaluate the request. The Corps granted the Applicants'

request, permitting them to dump at the Central Long Island Sound ("CLIS") dumpsite located off the shores of New Haven, Connecticut.

On September 1, 1981, the Applicants again requested that their permits be modified, this time to allow dumping further west in the Sound. The purpose of the modification was to gain access to a site which would entail lower transportation costs than the CLIS site. The Applicants, still acting collectively, stated that the new modification might be "the difference between the entire project going forward, being severely cut back, or indefinitely postponed." However, of the 19 historically used sites scattered throughout the Long Island Sound, 16 had been closed for environmental reasons, leaving the western Sound without a dumpsite. In order to fulfill the modification request, the Corps was required to designate a new dumpsite. The Applicants suggested that there were several potential sites which could be used, including "the triangle site bordered by the old [closed] Stamford, Norwalk and Eatons Neck Dump Sites." The Corps adopted this suggestion, proposing to designate this site located off the shores of Huntington, New York as Western Long Island Sound III ("WLIS III"). The Corps also proposed to utilize the newly designated site as the repository for spoils from additional federal dredging projects. In its public notice announcing the proposal to designate WLIS III, the Corps listed two "[p]lanned Federal projects which could be served" by the new site. The Corps intended to dredge 530,000 cys of waste from Flushing Bay, New York and 30,000 cys from Mianus River, Connecticut. With the addition of the 86,000 cys from Mamaroneck Harbor, the new site from its inception was intended to be the repository of at least 646,000 cys of dredged waste material—well in excess of the 560,000 cys projected for WLIS III by the Corps in its public notice.

The designation of a new dumping ground in the western Sound is a "major Federal action" requiring an EIS under NEPA. *See* 42 U.S.C. § 4332(2)(C). Accordingly, public hearings were held in late October 1981 to discuss designation of the new site. Predictably, those in attendance at the hearings held in Mamaroneck and Norwalk generally were in favor of the proposal, while those at the Huntington meeting generally were

opposed to the site designation. On December 9, 1981, the Corps published its intention to submit an EIS for the WLIS III site, and issued its draft EIS ("DEIS") nine days later.

The DEIS was written to "describe[ ] the impacts" of designating an open water disposal site in the western Sound. In its discussion of the needs and objectives for the new site, the Corps stated that the proposed site would "service the ports and harbors within the Western Long Island Sound area" and cited the 23 Mamaroneck Applicants as potential users of the newly designated location. In its discussion of alternatives to the proposed action, the Corps specifically considered 13 potential sites, including WLIS III. The Corps immediately eliminated 11 of these sites, stating that eight sites had already been closed for environmental reasons, two were being used as lobster fisheries, and one was not viable because it was located in a cable area used by electric utility companies. The DEIS purported to analyze the remaining open water site. WLIS III, and the possibility of taking "no action."

Much of the data used in the DEIS was extrapolated from the draft of a programmatic EIS for Long Island Sound (the "DPEIS"). The DPEIS, undertaken several years earlier, was a generic impact study of dredged waste disposal in the entire Long Island Sound and was not intended to focus specifically on any single site. The Corps incorporated the DPEIS into the impact statement for the purpose of providing general environmental data about the area surrounding WLIS III.

Citing the fact that "[t]here presently exists no chemical data on the sediments at the [proposed] site," the Corps omitted chemical analysis of WLIS III sediments in its EIS. Evaluation of water quality at the proposed site was also omitted, in favor of a generalized discussion of western Sound waters taken from the DPEIS. Analysis of *specific* environmental impacts of disposal at WLIS III were "to be addressed on a dredging project specific basis" at a later stage, when individual permit applications were evaluated. Although the DEIS indicated that there would be a "short term release of sediment contaminants into the water column" at WLIS III, the precise nature of the contamination 'would depend on the nature of the sediments" which would not be known until after designation of the site.

Similarly, analysis of toxicity to living organisms at the site was deferred to the permit evaluation stage as was analysis of chemical contamination to the floor of the WLIS III site.

The Corps solicited comments regarding the DEIS from relevant federal, state and local environmental agencies, and interested private citizens. Comments critical of the DEIS included letters from the Department of Commerce Office of Marine Pollution Assessment, the Fish and Wildlife Service, the Town of Huntington and numerous others. The Department of the Interior Office of Environmental Project Review complained of the lack of "critical analysis of alternatives" in the DEIS, stating that the majority of alternatives presented "appear[ed] to be 'straw men' " since most had either been closed or were committed to other uses. The Suffolk County Executive and the Long Island Sound Taskforce complained that the DEIS failed adequately to detail likely users of the new site. Most of the additional criticism received by the Corps was directed at the apparent haste with which the draft was prepared, lack of data on the types and quantities of material to be disposed of, lack of analysis of the cumulative effects of disposal at WLIS III, and lack of data specific to the WLIS III site.

A final EIS ("FEIS") was issued on February 12, 1982 substantially unchanged from the DEIS. In response to the critical comments received, the FEIS listed 24 federally authorized channels in the western Long Island Sound which "could potentially utilize the WLIS III disposal site." These channels included Mamaroneck Harbor, and were in addition to the Applicants' dredging projects. The Corps reiterated that the types, quantities and cumulative effects of disposal would be analyzed on a case-by-case basis during review of permit applications. Thus, sediments from the 23 harbors other than Mamaroneck were not evaluated for their effects on WLIS III.

DISCUSSION

The Corps principally contends on this appeal that NEPA requires only that an agency follow certain specified procedures in reaching its decision. The Corps maintains that the statute's

requirements are fulfilled when an agency's conclusions in the EIS have a substantial basis in fact and the EIS considers reasonable opposing views. The Corps also contends that the district court's issuance of a permanent injunction was erroneous as a matter of law.

A. *Applicability of the Ocean Dumping Act*

The opposing parties in the instant case rely heavily on regulations promulgated under the Ocean Dumping Act in arriving at their positions. We review the question of whether the Act applies to designation of a new disposal site in the Sound by bearing in mind that an agency is entitled to deference regarding interpretation of regulations it participated in formulating and is charged with administering. *Bersani v. Robichaud*, 850 F.2d 36, 45 (2d Cir. 1988) and cases cited therein; *National Wildlife Federation v. Benn*, 491 F.Supp. 1234, 1245 (S.D.N.Y.1980). This Court, however, will affirm the decision of the district court if we concur in its finding that the Corps' action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Bersani*, 850 F.2d at 46.

1. Legislative history

Recognizing the dangers of unregulated dumping of waste materials into ocean waters, Congress in 1972 enacted the Ocean Dumping Act, 33 U.S.C. §§ 1401 *et seq.* (1982). Under the Ocean Dumping Act, the Secretary of the Army, through the United States Army Corps of Engineers, shares responsibility with the Administrator of the Environmental Protection Agency ("EPA") for implementing federal environmental policies and goals with regard to ocean dumping. The Corps is given responsibility, with oversight from the EPA, for issuing permits for transportation and disposal of dredged wastes into the ocean. 33 U.S.C. § 1413.

Congress amended the Ocean Dumping Act in 1980 to require that dumping of dredged material in Long Island Sound by federal agencies, or by private parties whose projects exceed 25,000 cys of waste, be subject to the environmental testing cri-

teria of the Act. 33 U.S.C. § 1416(f). These criteria establish strict standards for determining whether and where dredged wastes may be disposed in the ocean and are more stringent than those promulgated under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (1982 & Supp. III 1985) (the "Clean Water Act"), which regulates the Corps' dredged waste permit program for inland waters. Thus, the 1980 amendment subjects the Sound to two qualitatively different regulatory schemes.

The 1980 amendment to the Ocean Dumping Act reads in pertinent part:

> the dumping of dredged material in Long Island Sound from any Federal project (or pursuant to Federal authorization) or from a dredging project by a non-Federal applicant exceeding 25,000 cubic yards shall comply with the criteria established pursuant to the second sentence of section 1412(a) of this title relating to the effects of dumping.

33 U.S.C. § 1416(f). The bill was proposed in order to "amend existing law to consider the Long Island Sound as *ocean waters* for the purpose of ocean dumping regulation." H.R.Rep. No. 894, Part 1, 96th Cong., 2d Sess. 2 (1980) U.S.Code Cong. & Admin. News p. 2572 (emphasis added). Congress declined to recharacterize the Sound as "ocean waters" in the definitional sense, choosing instead to focus on the permit evaluation process as a means of applying Ocean Dumping criteria.

An interim proposal provided that "any permit issued under section 404 of the Clean Water Act" for dredged waste disposal in the Sound be subject to the testing criteria of the Ocean Dumping Act. 126 Cong. Rec. H31919 (Dec. 3, 1980). However, this version led to concerns that marina owners "engaged in small dredging projects" would be unduly burdened by "an unrealistically costly set of testing standards." 126 Cong.Rec. H34063 (Dec. 13, 1980) (remarks of Rep. Studds). The final version of the bill thus provided that "small marine owners dumping less than [25,000] cubic yards would be exempt" from the testing requirements of the Ocean Dumping Act. 126 Cong. Rec. S33788 (Dec. 12, 1980) (remarks of Sen. Moynihan).

The exemption notwithstanding. Congress intended that "the bulk" of dredged waste dumping be subject to the ocean dumping criteria. In enacting the bill, Congress noted that federal projects and private operations exceeding 25,000 cys comprised "94 percent of all dredged material dumped in the sound." 126 Cong.Rec. H34063 (Dec. 13, 1980) (remarks of Rep. Ambro). Private dredging operations consisting of less than 25,000 cys would "still be subject to the Clean Water Act criteria." *Id.* The amendment obviously was intended to strengthen permit evaluation procedures regarding dredged waste disposal in the Sound. However, an ambiguity exists whether designation of a new site is encompassed by the amendment. We think the answer lies in the regulatory scheme for permit evaluations.

2. Permit evaluation procedures

Under both the Clean Water Act and the Ocean Dumping Act, site designation is part of the permit evaluation process. *See National Wildlife Federation v. Costle*, 629 F.2d 118, 127 (D.C.Cir.1980) (Corps' designation of dumpsite is exercise of its permit licensing authority). The Clean Water Act's permit review regulations, 33 C.F.R. § 323.6(a), require the Corps to "review applications for permits for the discharge of dredged or fill material . . . in accordance with guidelines promulgated by the Administrator [of the] EPA," and refer the Corps to EPA site designation regulations, 40 C.F.R. Part 230. Similarly, the Ocean Dumping Act regulations, 33 C.F.R. § 324.1, set forth procedures to be followed by the Corps "in connection with the review of applications for ocean dumping permits" at dumping sites designated under 40 C.F.R. Part 228.

The Corps contends that 40 C.F.R. Part 228 applies only to the evaluation of permits and not to designation of a new site. We think the Corp reads the regulations too narrowly. Section 228.4(e)(2), titled "Dredged Material Permits", clearly envisions situations "where a recommended disposal site has not been designated by the Administrator, or where it is not feasible to utilize a recommended disposal site that has been designated by the Administrator." In those situations, Section 228.4(e)(2) provides that the Corps "shall, in consultation with EPA, *select*

a site" in accordance with specific criteria for site selection promulgated by the EPA. (emphasis added). When the Applicants requested permits for a site in the western Sound, the Corps was presented with a situation in which it was "not feasible to utilize a recommended disposal site." As the Corps indicated in its public notice on the newly proposed site, designation of WLIS III was undertaken in order to provide the Applicants with a less costly disposal site as well as to provide for the Flushing Bay and Mianus River federal projects.

Congress was emphatic that the Ocean Dumping Act was not intended to permit large private dredgers "to evade additional testing requirements by breaking an integral project involving more than 25,000 cubic yards into smaller pieces." 126 Cong. Rec. H34063 (Dec. 13, 1980) (remarks of Rep. Ambro). Although the Applicants clearly considered themselves to be a unit for purposes of obtaining permission to dump in the Sound, they wanted to be treated separately in order to avoid "costly sampling and testing such as bio-assay sampling" required by the ocean dumping criteria. By entering into a "collective contract," the Applicants sought to gain the economic benefits of a large dredging project while evading the testing requirements of the Act.

We have serious doubts as to whether the Corps should have considered the Applicants separately given that the total yardage of waste collected among them would *exceed* 25,000 cys. The Corps has simply done for the Applicants what the Applicants are not permitted to do for themselves, i.e., evade the ocean dumping criteria for projects in excess of 25,000 cys.

Even assuming that the Applicants were entitled to be treated separately and thus were exempt under the Act, the Corps' own plans to dredge 560,000 cys of waste from Flushing Bay and Mianus River were not exempt, nor were the remaining federally authorized harbor projects listed in the FEIS. There is no question that *federal* projects are covered by the 1980 amendment and not by the standards of the Clean Water Act. We therefore agree with Judge Mishler that the Ocean Dumping Act applies to the designation of WLIS III.

B. *Sufficiency of the EIS*

We turn now to the question of whether the EIS submitted by the Corps satisfied the rigorous requirements of the Act.

The sufficiency of an EIS is determined according to the "rule of reason," under which the EIS will be upheld as adequate if it has been

> compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm . . . against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir.1977), cert. denied, 434 U.S. 1064, 98 S.Ct. 1238, 55 L.Ed.2d 764 (1978). This Court of course is "in as good a position as the district court to determine on the undisputed facts what could reasonably be required of the EIS in issue." *Id.* (citations omitted).

After reviewing the voluminous submissions, including the FEIS, DEIS, DPEIS and their various appendices, we conclude that the EIS submitted by the Corps did not adequately analyze the types, quantities and cumulative effects of spoil to be dumped at WLIS III. Although data from an earlier federal survey of the Mamaroneck Harbor was included in the EIS, that data was insufficient to permit an informed site designation decision by the Corps. The vast bulk of material, 560,000 cys of waste from Flushing Bay and Mianus River, was not analyzed in the study. While we agree with the Corps that it was not required to engage in a "crystal ball inquiry" into all possible future permit applications for purposes of a site designation study, *see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551, 98 S.Ct. 1197, 1215, 55 L.Ed.2d 460 (1978) (EIS is not defective simply because agency fails to "ferret out every possible alternative"); *County of Suffolk*, 562 F.2d at 1378 (EIS need not include mere speculation as to future events), the possibility that the WLIS III site would be utilized by two federal projects involving

560,000 cys of waste was certainly foreseeable. The Corps' public notice announcing hearings on the designation of WLIS III listed the Flushing Bay and Mianus River projects as "Planned Corps of Engineer Maintenance Dredging" projects. Nevertheless, there was no mention at all of the Flushing Bay project in the final EIS. Morever, 23 of the 24 harbor projects that were mentioned did not include any data on the types or quantities of their sediments. The sole exception was Mamaroneck Habor, for which data was available from an earlier survey.

The Ocean Dumping Act by its terms contemplates that projects of the magnitude of the Flushing Bay dredging operation be carefully analyzed when making site designation decisions. The dumping permit program for dredged material, 33 U.S.C. §§ 1413(a) and (b), requires the Corps to determine appropriate locations for dumping in accordance with the criteria set forth in 33 U.S.C. § 1412(a), including the effect of dumping "particular volumes and concentrations" of material, and the "persistence and permanence" of the effects of dumping. 33 U.S.C. § 1412(a)(E) and (F). While Section 1412 of the Ocean Dumping Act outlines the broad parameters of the necessary environmental factors to be considered, it is Section 228.6 of the EPA's site designation guidelines which indicates the requisite specificity of the environmental analysis to be undertaken. Those regulations, captioned "Specific criteria for site selection," require consideration of "[t]ypes and quantities of wastes proposed to be disposed of" and "[e]xistence and effects of current and previous discharges and dumping in the area (including cumulative effects)." 40 C.F.R. § 228.6(a)(4) and (7). Finally, Section 228.6(b) of the EPA site designation guidelines states that this detailed analysis "will be used in the preparation of an environmental impact statement for each site where such a statement is required by EPA policy." Thus, the Corps' decision to prepare an EIS for designation of WLIS III triggered applicability of the full panoply of Ocean Dumping Act criteria, and these criteria should have been considered in formulating the EIS.

C. *NEPA*

An EIS required under NEPA must assess any adverse effects of a proposed action, alternatives to the proposal, the relationship between short-term use and long-term productivity of the affected environment, and any irreversible and irretrievable commitments of resources which would be involved in the implementation of the proposal. 42 U.S.C. § 4332(2)(C) (1982). The purpose of an EIS is to "compel the decision-maker to give serious weight to environmental factors" in making choices, and to enable the public to "understand and consider meaningfully the factors involved." *County of Suffolk*, 562 F.2d at 1375 (citing *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir.1975)). *See City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 747-48 (2d Cir.1983), *cert. denied*, 465 U.S. 1055, 104 S.Ct. 1403, 79 L.Ed.2d 730 (1984) (NEPA is designed to infuse environmental considerations into government decisionmaking).

The Council on Environmental Quality ("CEQ") guidelines promulgated under NEPA, 40 C.F.R. Part 1502 (1987), state that the primary purpose of an EIS is to serve as an "action-forcing device to insure that the policies and goals" of NEPA are "infused into the ongoing programs and actions of the Federal Government." *Id.* § 1502.1. The objective criteria by which this Court will evaluate the Corps' EIS are discussed extensively in *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 88-89 (2d Cir.197-5). That case is strikingly similar to the instant case in that the *Callaway* decision involved a challenge to an EIS allegedly deficient in its discussion of the types, quantities and cumulative effects of dredged waste disposal projects in the Long Island Sound. There the plaintiff claimed that several projects were pending while the EIS was being prepared by the U.S. Navy and that those projects were sufficiently foreseeable to have been included in the statement. This Court held in *Callaway* that the EIS failed to meet NEPA's standard of comprehensive evaluation, citing the CEQ guidelines for preparation of an EIS. *Id.* at 89. We so hold here.

The fundamental flaw in the Corps' EIS is its too-circumscribed view of the "project" which is the subject of its

impact analysis. The Corps conceives of its "project" as the designation of a disposal site. It has rigidly adhered to the position that site designation and permit issuance are two distinct and unrelated actions. It has steadfastly maintained that particularized discussion of types, quantities and cumulative effects of dredged wastes to be deposited at WLIS III is outside the scope of the EIS and must await analysis on a case-by-case basis. We disagree. This is merely a variant of "segmentation" which has been uniformly rejected by courts. "Segmentation" or "piecemealing" occurs when an action is divided into component parts, each involving action with less significant environmental effects. *See City of West Chicago v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 650 (7th Cir. 1983). Segmentation is to be avoided in order to "insure that interrelated projects[,] the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

CEQ guidelines provide that proposals should be included in the same EIS if they are "connected," that is, if they are "closely related" such that they are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii). *See Save the YAAK Comm. v. Block*, 840 F.2d 714, 719 (9th Cir. 1988) (analyzing CEQ guidelines on "connected" projects); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 (2d Cir. 1988) (per curiam) (same). The proper test to determine relatedness under 40 C.F.R. § 1508.25(a)(1)(iii) is whether the project has independent utility. *Sloop Clearwater*, 836 F.2d at 764 (citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1242 (5th Cir. 1985)). The designation of WLIS III clearly has no utility apart from its planned usage as a disposal site. Designation of a site to contain a contemplated load of 646,000 cys of waste material surely was related to the then-pending applications to dump the remaining 86,000 cys and the Corps' own plans to dump the remaining 560,000 cys. It is simply untenable to view site designation as distinct from issuing permits to use the site. We therefore agree with the district court that the Corps violated NEPA

by not including a particularized discussion of the types and quantities of sediments to be dumped at WLIS III.

Moreover, it is well settled that the cumulative effects of a proposed federal action must be analyzed in an EIS. The Supreme Court in *Kleppe v. Sierra Club* has stated:

> when several proposals for . . . actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.

427 U.S. 390, 410, 96 S.Ct. 2718, 2730, 49 L.Ed.2d 576 (1976). The genesis of this requirement is in the CEQ guidelines which provide that an EIS should analyze cumulative impacts when to do so is "the best way to assess adequately the combined impacts of similar actions." 40 C.F.R. § 1508.25(a)(3). We do not take issue with particular conclusions reached by an agency after it has taken a "hard look" at environmental factors involved. *See City of New York v. U.S. Dep't of Transp.*, 715 F.2d at 748 (NEPA mandates no particular substantive outcomes). However, it is improper to *defer* analysis of the types, quantities and cumulative effects of waste dumping when designating a new waste disposal site.

Even if the Corps were satisfied with its action, public scrutiny of the basis for the Corps' decision of "essential to implementing NEPA." 40 C.F.R. § 1500.1(b). *See Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983) (EIS must set forth sufficient information for general public to make informed evaluation). We note in particular the comments by agency experts from the Department of Interior Office of Environmental Project Review, the Department of Commerce Office of Marine Pollution Assessment, and the Fish and Wildlife Service which indicated that evaluation of the merits of WLIS III as a dumpsite was made difficult or impossible by the lack of sufficient data in the EIS submitted. For these reasons, we hold that the Corps violated NEPA by not including analysis of the types, quantities and cumulative effects of waste disposal in its EIS.

D. *Injunctive Relief*

Injunctive relief is provided under the terms of the Ocean Dumping Act, 33 U.S.C. § 1415(g)(1), and has been used when appropriate for violations of NEPA. *See Sierra Club v. United States Army Corps of Engineers*, 732 F.2d 253 (2d Cir. 1984) and related cases; *Natural Resources Defense Council v. Callaway*, 524 F.2d at 95. However, injunctive relief does not follow automatically upon a finding of statutory violations, including environmental violations. On the contrary, "[a]n injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982) (quoting *Cavanagh v. Looney*, 248 U.S. 453, 456, 39 S.Ct. 142, 143, 63 L.Ed. 354 (1919)). Although it may be argued that the proper equitable balancing was implicit in the district court's opinion, issued the same day as the order granting the injunction, neither the opinion nor the order addressed the appropriateness of an injunction on the facts of this case. Accordingly, we vacate the permanent injunction and remand for the purpose of making such a determination, to be guided by traditional equitable principles. We note that the vacating of the injunction need not lead to immediate resumption of dumping at WLIS III, since an application for interim injunctive relief can be made promptly to the district court.

CONCLUSION

Site designation procedures for Long Island Sound ought to be consistent with Congress' intention to afford the Sound "equal or greater protection from polluted dredged spoils [as that afforded to] open ocean waters." 126 Cong.Rec. H34063 (Dec. 13, 1980) (remarks of Rep. Ambro). In order to achieve this goal, the Corps' designation of a new open water disposal site in the Sound must be undertaken in accordance with criteria promulgated under the Ocean Dumping Act.

The fragile waters of the Sound are entrusted to the safekeeping of the Corps of Engineers. It is the combination of relevant

statutory parameters provided by the ocean dumping criteria and faithful adherence to NEPA's mandate which will insure "excellent decisions" regarding the future of the Sound. Because the Corps did not apply the ocean dumping criteria to its site designation decisions, and because these criteria were omitted from the EIS submitted, the Corps' action was "not in accordance with law." 5 U.S.C. § 706(2)(A).

The judgment of the district court granting plaintiffs' motion for summary judgment and denying defendants' cross-motion for summary judgment is affirmed, the permanent injunction is vacated and the case is remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 82-0793

January 3, 1989

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR, III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OF DECISION AND ORDER

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MISHLER, *District Judge*

The Second Circuit Court of Appeals vacated the permanent injunction issued on March 22, 1988 and remanded the case to this court to determine whether injunctive relief is appropriate under "traditional equitable principles."

In the memorandum of decision dated March 22, 1988 granting summary judgment we noted that the United States Department of the Interior and the Office of Marine Pollution Assessment criticized the Corps for doing a "rush" job. Both agencies pointed out the lack of site-specific data and the lack of physical and chemical data regarding the dredged material to be dumped at the proposed site." (p.18).

From the date of the designation of WLIS III as an open water dump site for dredged spoils to March 1988, approximately 700,000 cubic yards of dredged spoils have been dumped at the site. Approximately 48,000 additional cubic yards of dredged spoils were dumped at the site during the period from March 28, 1988 to May 23, 1988. (See letters from U.S. Attorney's office in accordance with the court's order of March 29, 1988). Approximately 84 applicants have been granted permits or amendments to permits for dumping dredged spoils at the site.

Defendants oppose the issuance of a permanent injunction, absent proof that plaintiff "would suffer any harm if the Corps were allowed to continue operations at WLIS III which has been going on since March 1982." (Defendants' Memo, p.3). At oral argument of plaintiffs' motion for reinstatement of the permanent injunction dated March 22, 1988, defendants were unable to advise the court what steps it had taken or contemplated to comply with ODA and NEPA.

DISCUSSION

In *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979), the court stated:

> The standard in the Second Circuit for injunctive relief clearly calls for a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) suffi-

> ciently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief.

The court in defining irreparable harm observed:

> As to the kind of irreparable harm that the party seeking an injunction must show, the language of some past cases has suggested to some a spectrum ranging from possible to probable which is defined as 'not remote or speculative but . . . actual and imminent. . . .' [I]t has always been true that irreparable injury means injury for which a monetary award cannot be adequate compensation. . . .[1]

See Loveridge v. Pendleton Woolen Mills, Inc., 788 F.2d 914, 917 (2d Cir. 1986) (It is well established that "irreparable injury means injury for which a monetary award cannot be adequate compensation." citing *Jackson Dairy*).

The plaintiff having succeeded on the merits, the permanent injunction may issue on a showing of irreparable harm. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 107 S. Ct. 1396, 1404 [n.12] (1987) citing *University of Texas v. Camenisch*, 451 U.S. 390, 392, 101 S. Ct. 1830, 1832 (1981); [*Sierra*] *Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir. 1984).

We consider "the competing claims of injury and . . . the effect on each party of the granting or withholding of the requested relief." In considering the effect of granting or withholding injunctive relief the court should not overlook the public interest. *Amoco Production*, 107 S. Ct. at 1402. Compliance with a statute is a matter of public interest, though there is no absolute duty to issue an injunction "under all circumstances" in order to ensure compliance. *Amoco Production*, 107 S. Ct. at 1402, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S. Ct. 1798, 1803 (1982).

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1 Judge Mansfield (concurring) states, "In my view, the nature and extent of the threat of irreparable injury required for relief in any given case will vary on account of likelihood of success on the merits." *Id.* at p.74.

The Congress designated the WLIS III site as an ocean dumping site to give assurance that the physical chemical and biological balance in those waters would be maintained. The requirement of FEIS under ODA, NEPA and its regulations was for the purpose of giving the public adequate time and opportunity to investigate and argue the effects of the dumping of dredged spoils. We do not accept the opinion of the Corps as a substitute for Congressional mandate. We believe that absent an injunction prohibiting the dumping, the Corps will engage in the practice of issuing permits for the illegal use of the site.

The resulting effect of the issuance of an injunction is the inconvenience and additional cost to owners of docks and piers.[2] The public has an interest in maintaining the physical, chemical and biological balance at the dump site that outweighs the private interest. *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1121 (2d Cir. 1975), *cert. denied*, 426 U.S. 911, 96 S. Ct. 2237 (1976) (A court of equity "may go much further both to give or withhold relief in furtherance of the public interest where only private interests are involved"). Of equal importance is the insistence that the Corps comply with ODA, NEPA and the regulations. *Weinberger*, 456 U.S. at 314, 102 S. Ct. at 1804; *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489, 1494 (9th Cir. 1987); *National Resources Defense Council v. Callaway*, 524 F.2d 79, 83 (2d Cir. 1975).

In balancing the competing claims and the effect the granting or withholding of the injunctive relief would have on the parties, we find that the plaintiffs have established irreparable damage and the right to the injunctive relief as set forth in the Permanent Injunction Judgment dated March 22, 1988.

Upon the entry of a permanent injunctive judgment, the preliminary injunction order contained in the order to show cause on December 5, 1988 shall cease and be of no effect.

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2 See affidavit of Bernard J. Rosenhein, president of Mamaroneck Beach and Yacht Club, Inc. seeking intervention.

SO ORDERED.

/s/ JACOB MISHLER
U.S.D.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 82-0793

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR, III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants.

PERMANENT INJUNCTION JUDGMENT

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MISHLER, *District Judge*

The court having granted the plaintiffs' motion for summary judgment in a memorandum of decision and order dated March 22, 1988, and having issued a memorandum of decision dated December 29, 1988 considering the factors appropriate for the issuance of a permanent injunction as directed by the Second Circuit Court of Appeals, ____ F.2d ____, now therefore, it is

ORDERED and ADJUDGED that defendants, their agents, servants, employees and anyone acting in concert with them are hereby enjoined from dumping any dredged materials removed from any harbor, waterway, or marina into the Long Island Sound site known and designated as WLIS III; and it is further

ORDERED and ADJUDGED that defendants, their agents, servants, and employees and anyone acting in concert with them are hereby enjoined and prohibited from issuing any permits or licenses or otherwise permitting any third parties from dumping dredged materials into the Long Island Sound site known and designated as WLIS III; and it is further

DECLARED that the Final Environmental Impact Statement made the basis for the decision to designate WLIS III as a site for the disposal of dredged material fails to comply with the National Environmental Policy Act of [1969] ("NEPA"), 42 U.S.C. § 4321 *et seq.* and is void and of no effect.

The court retains jurisdiction over this matter and grants defendants the opportunity to comply with the pertinent statutes and regulations and seek modification of this judgment.

Dated: Uniondale, New York
January 3, 1989

/s/ JACOB MISHLER
Jacob Mishler,
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 82-0793
October 26, 1989

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR, III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OF DECISION AND ORDER

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MISHLER, *District Judge*

The court held an evidentiary hearing in accordance with the remand of the Second Circuit Court of Appeals to determine whether injunctive relief is appropriate. In balancing "all the equities and interests presented . . . ." 884 F.2d 648 (2d Cir. 1989), we find:

The Western Long Island Sound site ("WLIS III") is approximately one nautical mile (approximately 6,000 feet) along the deepest value of the sea floor of the sound in the western part of the Long Island Sound. It is approximately 95 feet to 100 feet in depth. The site consists of three discreet mounds formed by the dumping of dredged material from approximately 820 feet in diameter to 1600 feet in diameter. The three mounds occupy approximately 8% of the WLIS III site.

The dumping of dredged materials at the site does not affect the areas near the mounds. The dredged materials delivered by barges are dropped on the mounds and it remains at the place it enters the water of the Sound. The dissolved oxygen content of the water at the floor of the site has been affected minimally since the dumping began in 1982. Prior to the commencement of dumping in 1982 the dissolved oxygen content at the floor of the site could not sustain fish or lobster.

WLIS III and three other disposal sites, i.e., Central Long Island, New London and Kornfield Shoals contribute only 1% to 2% of the sediment that naturally flows into the Sound from rivers and runoffs from land.

At times benthic forms of life are nurtured. Though the dumping of materials may smother some of these organisms (usually if the load adds three feet or more to the mound), they usually burrow up through the layers of sediment to the top and recolonization takes place. The decomposition of the organisms increases the oxygen. Fish and lobster are attracted to the site.

We find that the dumping of dredged materials since 1982 did not adversely affect the environment. The continued dumping will not cause irreparable harm to the environment.

We consider the effect that an injunction prohibiting the dumping of dredged materials would have on governmental authorities, private entities and the public.

A ban on dredging harbors and waterways would significantly impede navigation in the sound and present the risk of grounding of pleasure boats and commercial vessels. The grounding of oil barges and tankers and the possibility of oil spills is not overlooked.

The cost of dumping dredged materials at other sites from some locations is more than doubled, e.g., the cost for the Town of Greenwich, Connecticut, to dump dredged material at the Central Long Island Sound dump increases from $8.50 per cubic yard at WLIS III to $18.95 per cubic yard. As a result the Town, for budget reasons, would close its marina that accommodates 225 boats. Privately operated marinas, like the Caprie Marina at Port Washington would be similarly affected.

CONCLUSION

The continued dumping of dredged materials will not cause damage to the dump site or surrounding area. The physical, chemical and biological balance at the dump site or surrounding area will not be significantly affected by continued dumping. Plaintiffs have failed to sustain their burden of showing irreparable damage to the environment. On the other hand, the increased cost of dumping dredged material at other locations would discourage dredging with the consequent risk to boats using ports, harbors and channels and cause severe economic loss.

Findings of fact and conclusions of law are made in accordance with Fed. R. Civ. P. 52(a).

ORDER

The motion for injunctive relief is denied. A judgment granting declaratory relief is entered simultaneously herewith.

SO ORDERED.[1]

/s/ JACOB MISHLER
U.S.D.J.

1 We decline to consider alternatives as suggested in plaintiffs' post-trial memorandum in the event the defendants fail to comply with the timetable represented to the Court of Appeals and this court for publishing the required Environmental Impact Statement and otherwise fulfilling their obligation under the Ocean Dumping Act and the National Environmental Protection Act. The court will consider any application for relief in support of the judgment entered herein.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 82-0793

October 26, 1989

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Plaintiffs,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR, III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Defendants.

JUDGMENT

The court having granted the plaintiffs' motion for summary judgment in a memorandum of decision and order dated March 22, 1988, and the Second Circuit Court of Appeals having vacated the injunction judgment made and entered thereon on January 3, 1989, and

the court having conducted an evidentiary hearing on the injunctive relief requested, and having denied injunctive relief in a memorandum of decision and order dated this day,

Now, therefore, it is

ADJUDGED and DECLARED that the Final Environmental Impact Statement made the basis for the decision to designate

WLIS III as a site for the disposal of dredged material fails to comply with National Environmental Policy Act of [1969] ("NEPA"), 42 U.S.C. § 4321 *et seq.* and is void and of no effect.

ROBERT C. HEINEMANN
Clerk

By /s/ KEITH A. JONES
Keith A. Jones,
Deputy Clerk

Dated: Uniondale, New York
October 26, 1989

Approved as to form

/s/ JACOB MISHLER
Jacob Mishler,
U.S.D.J.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

42 U.S.C. § 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

* * *

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems . . . ;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects. . . .

No. 89-781

In the Supreme Court of the United States

OCTOBER TERM, 1989

TOWN OF HUNTINGTON, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in requiring a showing of environmental harm to establish irreparable injury justifying the issuance of an injunction prohibiting the continued use, pending further agency evaluation, of an ocean site governed by the substantive criteria of the Ocean Dumping Act, 33 U.S.C. 1401 *et seq.*, where the site had been actively used for six years and the Corps of Engineers has nearly completed an expanded Environmental Impact Statement, to be used in determining whether to permit the continued use of the site.

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OPINIONS BELOW

The district court opinion of March 22, 1988 (Pet. App. A20-A32) is unreported. The court of appeals opinion of October 19, 1988 (Pet. App. A37-A54) is reported at 859 F.2d 1134 (*Huntington I*). The district court opinion of January 3, 1989 (Pet. App. A55-A60) is unreported. The court of appeals opinion of August 14, 1989 (Pet. App. A1-A17) is reported at 884 F.2d 648 (*Huntington II*). The district court opinion of October 26, 1989 (Pet. App. A64) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. The petition for a writ of certiorari was filed on Monday, November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the designation by the United States Army Corps of Engineers of an open water site in Long Island Sound for the disposal of dredge spoil. In the fall of 1981, a group of land and marina owners from the Mamaroneck Harbor area of New York requested that the Corps designate a dredge material disposal site in the western Long Island Sound area, and modify pre-existing dredging permits to allow for disposal of their dredged material at the newly designated site.[1] The Corps determined that a site-specific Environmental Impact Statement (EIS) should be prepared for the designation of a new disposal site. On December 18, 1981, the Corps issued a draft EIS related solely to the designation of the proposed Western Long Island Sound site (WLIS III) as an open water disposal site for dredged material. The public comment period expired on January 18, 1982, and the Corps issued the final EIS on February 12, 1982. Pet. App. A39, A41-A43. On March 16, 1982, the Corps issued a Record

[1] The permits had been issued earlier in 1981. They initially designated an area known as the "Mud Dump Site" in the Atlantic Ocean off New Jersey as the disposal site. The permits were later modified to allow the disposal of the dredged material at the Central Long Island Sound disposal site off New Haven, Connecticut. The request to designate the Western Long Island site for disposal was therefore the second modification of these pre-existing permits. Pet. App. A40-A41.

of Decision which announced the designation of WLIS III as a disposal site, and issued the modification of the pre-existing disposal permits. Disposal operations at the WLIS III site commenced in 1982 and continued until June 1, 1988, when the initial district court injunction took effect. Pet. App. A5. During that period, more than 667,240 cubic yards of dredged material were deposited at the site.[2] See note 3, *infra*.

Shortly after the Corps issued its Record of Decision, petitioners (the Towns of Huntington, North Hempstead and Oyster Bay, and the Counties of Nassau and Suffolk and officials of those communities) filed suit against the Corps and its officials. The original complaint alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Petitioners filed a motion for a preliminary injunction approximately two months after filing suit, but then apparently abandoned that motion. On December 16, 1986, a second amended complaint added a claim for relief under the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, also known as the Ocean Dumping Act.

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[2] The March 22, 1988, district court opinion states that "over 667,240 cubic yards of dredged material have been disposed of at WLIS III" (Pet. App. A27). The second district court opinion gives the amount as approximately 748,000 cubic yards (*id.* at A57). The recent Draft Supplemental EIS prepared by the Corps states that a total of 989,278 cubic yards were deposited at the site between 1982 and 1988. U.S. Army Corps of Engineers, *Draft Supplemental EIS for a Disposal Site for Dredged Material—Western Long Island Sound* (Dec. 1989).

On March 22, 1988, the district court issued a decision on the parties' cross-motions for summary judgment. It ruled that the Corps had erred in not applying the criteria set forth in the Ocean Dumping Act, 33 U.S.C. 1412(a), to the designation of WLIS III as an open water disposal site in Long Island Sound, and that the EIS prepared in 1982 for the site designation violated NEPA because it did not contain a discussion of the types, quantities and the cumulative effects of the dredged materials that might be deposited at the site (Pet. App. A20-A32). Without further discussion of remedy, the trial court issued a judgment enjoining the Corps from operating WLIS III until a Supplemental EIS had been prepared (*id.* at A33-A36).

On the Corps' appeal, the court of appeals affirmed the district court's ruling on the merits of the Ocean Dumping Act and NEPA controversies (Pet. App. A37-A54). The appellate court, however, agreed with respondents that the district court had not adequately evaluated the equities in imposing the injunction against operation of the WLIS III disposal site (*id.* at A53). Accordingly, the court of appeals remanded the question of remedy to the district court for further proceedings (*id.* at A54).

On remand, the district court declined to hold the evidentiary hearing requested by the Corps on the environmental conditions of the WLIS III disposal site. Instead, after oral presentations of counsel,[3] the

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[3] The Corps asserted that it had monitored conditions at WLIS III for more than six years, and that no environmental injury resulting from the dumping had occurred or was threatened. Counsel for petitioner Town of Huntington stated in the court of appeals that petitioners did not contest this assertion. Pet. App. A6, A8.

trial court re-entered the original injunction against operation of the disposal site. Pet. App. A55-A60. It ruled that petitioners had established irreparable injury by demonstrating a violation of the procedural requirements of the Ocean Dumping Act and NEPA; it stated that this injury outweighed the countervailing interests, which it characterized as "inconvenience and additional cost to owners of docks and piers" (*id.* at A59).

Respondents again appealed from the entry of injunctive relief. The court of appeals again reversed the injunctive order and remanded to the district court for an evidentiary hearing and consideration of the equities involved. Pet. App. A1-A16. The Second Circuit ruled that the district court had erroneously determined that "the establishment of a statutory violation, without more, warranted an injunction" (*id.* at A15). It ordered the district court, upon remand, to place the burden of establishing some actual or threatened irreparable injury to the environment on the petitioners (*id.* at A15-A16).[4]

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[4] The district court held an evidentiary hearing in accordance with this remand, to determine whether injunctive relief was appropriate once all equities and interests had been balanced (Pet. App. A65). The district court found that continued disposal of dredged material at WLIS III will not cause damage to the disposal site or surrounding area (*id.* at A66). The court held that petitioners had "failed to sustain their burden of showing irreparable damage to the environment", while "the increased cost of dumping dredged material at other locations would discourage dredging with the consequent risk to boats using ports, harbors and channels and cause severe economic loss" (*ibid.*). Consequently, the court denied petitioners' request for injunctive relief.

ARGUMENT

The decision of the court of appeals is correct. Although articulating the proper standard for evaluating requests for injunctive relief in connection with violations of the National Environmental Policy Act involves an important question of federal law, the present case does not present an appropriate context in which to address that issue. Even if this Court were to conclude that the interests protected by NEPA ordinarily obviate the need to show actual environmental harm in order to demonstrate irreparable injury, the result below would be correct because of the particular circumstances of this case. Moreover, the Supplemental Environmental Impact Statement ordered by the lower courts is almost completed, and the Corps of Engineers is expected to make a new decision designating an appropriate disposal site within a few months. Once the Supplemental EIS is completed and a new decision made, the issue presented by this petition will be moot.

1. Petitioners' primary submission (Pet. 7) is that the Second Circuit requires a showing of actual or threatened environmental harm to establish irreparable injury to support entry of injunctive relief for a violation of NEPA, and that this position is in conflict with the decisions of other circuits, notably *Sierra Club* v. *Marsh*, 872 F.2d 497 (1st Cir. 1989), *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983), and *Foundation on Economic Trends* v. *Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985).[5]

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[5] Most of the other decisions on which petitioners rely (Pet. 7-9) predate this Court's decisions in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), and *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), on which the court

Those decisions do articulate a broader theoretical basis upon which to predicate irreparable injury under NEPA—they postulate that agency decision-making might become biased if a project were allowed to proceed during the period in which supplementary environmental documents were being prepared to remedy a NEPA violation. 872 F.2d at 500-501; 716 F.2d at 952-953. The rationale behind this theory of irreparable injury rests on the observation that NEPA is an entirely procedural statute; it does not dictate that the ultimate agency decision conform to any particular environmental standards or requirements. Courts that have adopted this theory have expressed concern that a federal agency that becomes committed to a project by expending large sums on construction, or during a long period of administration, may not respond to the disclosures of the environmental consequences of the project in a

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of appeals properly relied. The sole exception is *Sierra Club* v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988). In that case, the court of appeals relied on a quotation from *Save the Yaak Committee* v. *Block*, 840 F.2d 714, 722 (9th Cir. 1988), which cited the *Gambell* directive that "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies." 480 U.S. at 542. The Tenth Circuit then concluded that in the case before it, "the risk of irreparable harm is impossible to assess," but legal remedies were inadequate because permitting construction of the highway at issue there to proceed before completion of the relevant NEPA studies would defeat the purposes of NEPA (848 F.2d at 1097). It is accordingly far from clear that the Tenth Circuit was concluding, despite the teaching of *Gambell*, that a violation of NEPA is enough to constitute the showing of irreparable harm necessary to support injunctive relief. In any event, as we explain *infra*, the instant case is quite different from cases involving "pure NEPA" challenges to the authorization of construction, such as the one before the Tenth Circuit in *Sierra Club*.

neutral or unbiased fashion. The risk that this will happen suffices, under this "procedural" theory, to constitute the irreparable injury necessary to support the issuance of an injunction pending correction of the NEPA violation.

The Second Circuit found that the above procedural theory of irreparable injury, whatever its merits, is inapplicable to this case. Pet. App. A12 n.1. The procedural theory has been articulated in cases based entirely on NEPA; this case, in contrast, also involves the substantive limitations imposed by the Ocean Dumping Act, 33 U.S.C. 1413(a). The court below concluded that the existence here of these substantive limits on agency decisionmaking makes the NEPA-based procedural theory of irreparable injury inapt.[6] That conclusion is clearly correct: where an environmental statute, such as the Ocean Dumping Act, provides substantive standards to govern a decision, those standards furnish the appropriate criteria for determining irreparable injury.

Secondly, even if the procedural theory of irreparable injury advocated by petitioners could support an injunction in a proper case, the possibility of procedurally based irreparable injury must be reasonably related to the facts of the particular case. See, *e.g.*, *Wisconsin* v. *Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984) (refusing to apply theory to ongoing project where "commitment entailed by the remaining construction effort * * * is relatively small, and thus the injunction's service to NEPA in preserving unbiased decision-making would be slight"). In the present case, petitioners sought an injunction in 1988

[6] The First Circuit itself has recognized this limitation on the application of its procedural theory. *Sierra Club* v. *Marsh*, 872 F.2d at 503-504.

to prevent the Corps and its permittees from continuing to use the WLIS III site for the disposal of dredged material, when the site had been used for such purposes since 1982.[7] If the use of WLIS III caused irreparable injury by inducing commitment of the decisionmaker to continuation of the use of that site, that injury must have occurred during the six-year period the disposal site had already been in use. Little additional commitment would be engendered by its additional use for the limited time necessary to complete the environmental documentation required by the courts.[8]

In sum, petitioners can point only to a potential conflict in the circuits on the definition of irreparable injury in NEPA cases: no direct conflict is presented here because, as the court below observed, the substantive standards of the Ocean Dumping Act applicable here provide an adequate basis for distinguishing this case from pure NEPA cases applying the procedural theory of irreparable injury. And even if the circuits have differed to some extent in their analysis of irreparable injury in this context,

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[7] The environmental injury to the site itself, caused by changing it from bare ocean floor to a disposal site, had long since occurred, and could not be reversed by the injunction.

[8] In fact, the situation here is almost identical to that faced by the district court in *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646 (D.P.R. 1979), vacated in relevant part, 643 F.2d 835 (1st Cir. 1981), reversed in relevant part *sub nom. Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). There, the district court refused to enjoin the Navy from conducting training activities on Vieques Island pending compliance with statutory requirements, when no appreciable harm to the environment had been demonstrated and the Navy had been conducting the activities for many years (see 478 F. Supp. at 705-708).

the interests underlying the procedural theory espoused by petitioners—avoidance of bias in the decisionmaker through commitment to the project—have not been squarely established and would in any event be extremely weak in this case. Therefore, the present case is not an appropriate vehicle for articulating generally applicable standards for injunctive relief in NEPA cases.

2. In December 1989, the Corps of Engineers published a draft Supplemental EIS for the designation of WLIS III as a disposal site for dredged material. The comment period is scheduled to close on February 12, 1990. The Corps informs us that the present schedule calls for a final Supplemental EIS in April 1990. Thereafter, the Corps is expected to make a new decision concerning the designation of an appropriate disposal site on the basis of this new EIS, which will correct the deficiencies identified by the courts below in the earlier EIS.

Relief in cases involving procedural violations of federal environmental laws is appropriate only pending completion of the procedures mandated by law. See, *e.g.*, *Minnesota Public Interest Research Group* v. *Butz*, 541 F.2d 1292, 1308 (8th Cir. 1976), cert. denied, 430 U.S. 922 (1977); cf. *Weinberger* v. *Romero-Barcelo*, 456 U.S. at 314. Under the Corps' present schedule, the Supplemental EIS and the application of the Ocean Dumping Act criteria to the WLIS III site will be final this spring. When those events take place, the posture of this case will alter significantly. The present question—whether petitioners can establish irreparable injury to sustain injunctive relief pending completion of the procedures mandated by NEPA and the Ocean Dumping Act—will be replaced by questions concerning the merits,

should petitioners continue to oppose whatever decisions the Corps of Engineers may make. Whether or not petitioners choose to challenge the merits of the forthcoming Corps decision, it is clear that the question presented by the instant petition will become moot once a decision based on the Supplemental EIS has been made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

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No. 89-781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Petitioners,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioners respectfully submit this Reply Brief in support of their petition for a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Second Circuit filed August 14, 1989, and in reply to the Brief for the Respondents in Opposition filed January 12, 1990.

REPLY ARGUMENT

A. This Case Is an Appropriate Vehicle for This Court's Review of Important Issues Pertaining to a District Court's Equitable Discretion to Issue Injunctive Relief for Violations of NEPA. The Fact That Respondents Have Violated More Than One Statute and Have Already Caused Injury Does Not Obviate the Need for an Injunction to Cure the NEPA Violation and Prevent Present and Prospective Injuries.

Although conceding that the petition for certiorari in this case "involves an important question of federal law" (Opp. at 6),[1] respondents argue that this particular case is an inappropriate vehicle for this Court's resolution of that important question. Respondents' objections to the petition are unfounded.

First, this case presents a unique opportunity for this Court to address a fundamental legal issue regarding the standards for equitable relief in NEPA cases. That issue is whether petitioners are entitled to injunctive relief based upon respondents' violation of NEPA's procedural provisions alone, or whether an additional showing of environmental injury is needed. As stated in the petition for certiorari, the court of appeals overreached its authority as a matter of law when, requiring petitioners to prove actual or threatened harm to the environment, it vacated the district court's injunction prohibiting ongoing violations of NEPA. The court of appeals acted contrary to the purposes of the statute, as detailed in this Court's opinions in *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1857-58 (1989), and *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1846 (1989). Furthermore, the court of appeals' foreclosure of the district court's equitable discretion to grant or withhold injunctive relief contravenes the principles stated by this Court in *Weinberger v. Romero-Barcelo*, 456 U.S. 305

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1 References in the form "(Opp. at _____)" refer to pages of the Brief for the Respondents in Opposition. References in the form "(Pet. App. A _____)" refer to pages of the Appendix to the Petition for a Writ of Certiorari.

(1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). And, as conceded by respondents, the court of appeals' imposition of an "environmental harm" requirement in NEPA cases is in conflict with decisions of other courts of appeals which "articulate a broader theoretical basis upon which to predicate irreparable injury under NEPA. . . ." (Opp. at 7). *See Sierra Club v. Marsh*, 872 F.2d 497, 499 (1st Cir. 1989); *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985); *Massachusetts v. Watt*, 716 F.2d 946, 951-52 (1st Cir. 1983); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1005-06 (5th Cir. 1981); *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512-13 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975); *Environmental Defense Fund, Inc. v. Froehlke*, 477 F.2d 1033, 1037 (8th Cir. 1973); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1183-84 (6th Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972).[2]

Second, respondents attempt to minimize the conflict between the decision in the court of appeals and the cited cases from other circuit courts because this case involves a violation of the Ocean Dumping Act, a substantive environmental statute, in addition to a NEPA violation. (Opp. at 8). Certainly however, respondents' violation of the Ocean Dumping Act cannot undo the harm caused by their NEPA violation. As repeatedly stated by this Court, NEPA is essentially procedural, and its policies and objectives are distinct from any substantive environmental statute. As the majority of circuits has held, a

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2 Without explanation, respondents dismiss all authorities cited by petitioners which "predate this Court's decisions in *Amoco Production Co.* . . . and *Weinberger* . . ." (Opp. at 6 n.5). Respondents fail to point out what new principles of law were announced in those decisions, which themselves purport to reaffirm the traditional equitable discretion of a district court to grant or withhold injunctive relief based on statutory violations. Respondents' implicit assumption that *Amoco Production Co.* and *Weinberger* render all prior authority meaningless is particularly puzzling because those cases do not, unlike the cases cited by petitioners, involve injunctions based on ongoing violations of NEPA.

NEPA violation is unique, and may warrant an injunction without regard to requirements for an injunction based on other violations. The court of appeals' offhand conclusion to the contrary (Pet. App. A12 n.1) is in itself sufficient reason for this Court to grant certiorari.

Next, respondents argue that because they had dumped dredged spoils in violation of the law for six years and the district court's prohibition of further illegal dumping could not restore the disposal site to its pre-disposal condition, the district court's issuance of the injunction was unreasonable. (Opp. at 8-9). Assuming for the sake of argument that respondents' peculiar scientific assumptions have any validity, respondents are once again arguing that because their violation is more egregious than the typical violation in "pure NEPA cases," the rationale for injunctive relief in those cases is inapplicable here. Petitioners believe that this reasoning is unacceptable. Such a rule would encourage an agency to adopt a policy of "act first, comply later" as the most expedient policy. In any event, the rationale applicable to injunctive relief in NEPA cases is the precise issue which this Court needs to address by way of plenary review after issuing a writ of certiorari.

B. The Issues Presented for Review on Certiorari Are Not Moot.

The dumping of dredged spoils at the WLIS III site in violation of NEPA and the Ocean Dumping Act continues. Respondents nevertheless make a *prospective* mootness argument, by promising to render a new site designation decision sometime after April 1990. (Opp. at 10).

It is well settled that a respondent may not moot this Court's review of an injunction prohibiting a violation of the law merely by promising future compliance. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Respondents' promise to conform their actions to the law in this case is immaterial for several additional reasons. Since March 1988, the disposal of dredged spoils at the WLIS III site has been declared in violation of NEPA and the Ocean Dump-

ing Act. (Pet. App. A20-36). If respondents had believed they could moot this case by complying with the law, they should have done so then.[3]

Moreover, as respondents themselves point out (Opp. at 10), the policies underlying NEPA do not permit a district court to enjoin agency action "permanently," but allow the court to enjoin the agency action only pending its compliance with the procedures mandated by the statute. Thus, every controversy involving injunctive relief based on a NEPA violation is necessarily of short duration and clearly falls within the category of cases involving "short term orders, capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1977). Respondents in this case should not be allowed to insulate from this Court's review the erroneous ruling of the Second Circuit regarding injunctive relief simply by representing that they will re-evaluate their prior illegal designation decision.

Finally, a new designation decision would not moot the importance of the issues presented for this Court's review. In their draft supplemental EIS released on December 12, 1989, respondents have again recommended a decision favoring the continued use of WLIS III as a dredged materials disposal site. Thus, it appears more than likely that respondents will continue to use WLIS III as a disposal site. Given the erroneous decision of the Second Circuit, respondents will be free to do so regardless of their compliance with NEPA's procedural mandate. Petitioners will have no effective remedy to enforce compliance with NEPA and thus no motive to challenge an agency violation, no matter how blatant. In short, regardless of respondents' promised compliance, a real controversy exists.

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3 Respondents have made a similar representation before. In June 1989, during oral argument on their second appeal to the court of appeals, respondents represented that a draft supplemental environmental impact statement would be released on October 16, 1989. (Pet. App. A7). That document, however, was not released until December 12, 1989.

CONCLUSION

Certiorari should be granted to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

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